2011

Fair Trespass

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ESSAY

FAIR TRESPASS

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Trespass law is commonly presented as a relatively straightforward doctrine that protects landowners against intrusions by opportunistic trespassers. Though widely supported in academic commentary and scholarship, this conventional viewpoint of trespass law lacks empirical and analytical grounding. In fact, the interests involved in trespass disputes often extend beyond the interests of a private landowner, affecting broad societal interests such as the free flow of information, public safety and health, and similar considerations.

This Essay attempts to align these observations with a doctrine more attuned to reality. To that end, it develops a new doctrinal framework for determining the limits of a property owner's right to exclude. Adopting the doctrine of fair use from copyright law, the Essay introduces the concept of "fair trespass" to property law doctrine. When deciding trespass disputes, courts should evaluate the following factors: (1) the nature and character of the trespass; (2) the nature of the protected property; (3) the amount and substantiality of the trespass; and (4) the impact of the trespass on the owner's property interest.

The main advantages of this proposal are twofold. First, this novel doctrine more carefully weighs the interests of society in access against the interests of property owners in exclusion. Second, by replacing the existing patchwork of ad hoc situations where courts excuse trespassory acts, this proposal provides a more coherent and consistent context in which to adjudicate trespass conflicts. By developing a balancing test to assess trespass claims, the proposed doctrine seeks to protect the rights of property owners on the basis of a more explicit and predictable framework, while at the same time safeguarding the societal interests in access.

INTRODUCTION

The law of trespass stands solemnly as a seemingly tranquil and uncomplicated backwater of property law. In property law casebooks, chapters on trespass are typically limited to a handful of standard cases, not uncommonly featuring some petty cross-border dispute between bicker-

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ing neighbors.[1] Similarly, most academic commentators agree that trespass doctrine is relatively uncomplicated: Because trespassing strikes at the very core of a property owner's right to exclude,[2] there is widespread agreement that property owners should be entitled to injunctive remedies to protect against trespassing.[3]

This basic understanding of trespass ignores an important, recurring conflict between the right to exclude, on the one hand, and the strong societal interests in obtaining access to private property, on the other. While property owners are entitled to protection against intrusion, society also has an interest in discovering dishonest or potentially harmful activities. In such instances, the legal system must balance the boundaries of privacy, private property rights, and the public's right to gather information that is relevant to the public interest.

To illustrate, consider the following hypothetical involving media trespass. After several cases of food poisoning, a local student newspaper decides to investigate a restaurant in the vicinity of the university campus. In order to assess the hygienic conditions of the restaurant's kitchen, the student reporter takes a job waiting tables at the restaurant without disclosing his identity. After the student newspaper publishes an article describing abominable conditions in the restaurant's kitchen, the restaurant sues the student newspaper for damages resulting from trespass and subsequent defamation.

Under basic trespass doctrine, the student newspaper will likely be held liable for trespass.[4] Moreover, the journalistic intentions of the trespassory act will not redeem the newspaper since, as stated in a decision by the Seventh Circuit, "there is no journalists' privilege to trespass."[5] Neglecting the value of access in this context is troubling for at least two reasons. First, investigative journalism often unveils information that is important to public welfare. For instance, undercover journalists frequently expose severe cases of injustice, such as the harmful mistreat-

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1. See, e.g., Jacque v. Steenberg Homes, Inc., 563 N.W.2d 154, 156–57, 166 (Wis. 1997) (holding $100,000 in punitive damages not disproportional amount where defendant intentionally trespassed onto neighbor's land after neighbor refused access for transport purposes).

2. See Thomas W. Merrill & Henry E. Smith, Property: Principles and Policies, at v (2007) ("The most basic principle is that property at its core entails the right to exclude others from some discrete thing.").

3. See, e.g., eBay, Inc. v. Bidder's Edge, Inc., 100 F. Supp. 2d 1058, 1067 (N.D. Cal. 2000) ("[A]n injunction is an appropriate remedy for a continuing trespass to real property."); Thomas W. Merrill, Trespass, Nuisance, and the Costs of Determining Property Rights, 14 J. Legal Stud. 13, 13 (1985) [hereinafter Merrill, Costs of Determining] (noting "when the intrusion is governed by trespass, . . . the landholder can obtain an injunction to prevent future invasions").

4. *Jacque*, 563 N.W.2d at 159–60 (recognizing legal prerogative of property owners to exclude all others from their land, regardless of reason for doing so).

5. Desnick v. Am. Broad. Cos., 44 F.3d 1345, 1351 (7th Cir. 1995).

ment of elderly residents by nursing home employees,[6] repackaging of unsanitary meat and fish by a grocery chain,[7] unnecessary cataract operations performed by an eye clinic,[8] and various other wrongdoings.[9] Second, because property owners often have nothing to gain (but a lot to lose) from such investigative journalism, reporters often must resort to various deceptive tactics in order to gain access to sensitive information, as several of the aforementioned examples indicate.

The case of media trespass illustrates the potential societal interests in obtaining access to private property. These interests extend well beyond instances of journalistic trespass. Potential justifications for acts of trespass may include preserving the interests of individuals, such as preventing private harm to oneself or one's property, or preserving interests shared by society at large, such as public safety and health considerations.

Trespass law rarely reflects on these broader interests involved in trespass disputes. Only in exceptional circumstances do courts permit instances of unauthorized entry onto land that would otherwise have been actionable as an act of trespass. In such occasions, courts excuse acts of trespass in two principal ways. First, courts sometimes establish that an act of trespass has been committed, but limit the compensation of the property owner to a nominal amount.[10] Second, courts sometimes create context-specific exceptions, as a result of which nonpermissive entries are no longer considered acts of trespass.[11]

Both these approaches to excusing acts of trespass are problematic. The lack of an explicit doctrinal foundation or coherent framework for such judicially carved exceptions to the right to exclude makes it difficult to assess ex ante what will be considered trespass, what will incur liability,

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6. See James A. Albert, The Liability of the Press for Trespass and Invasion of Privacy in Gathering the News—A Call for the Recognition of a Newsgathering Tort Privilege, 45 N.Y.L. Sch. L. Rev. 331, 333 (2002) (discussing Houston newspaper using "deceit to gain entry to a nursing home to photograph the mistreatment of elderly residents who were tied to their beds").

7. See Food Lion, Inc. v. Capital Cities/ABC, Inc., 194 F.3d 505, 510 (4th Cir. 1999) (finding undercover reporters posing as employees at food chain liable for trespass and breach of duty of loyalty to employer).

8. See *Desnick*, 44 F.3d at 1347–49, 1351–53 (finding no trespass where undercover reporters posed as patients at ophthalmic clinic, because "the entry was not invasive in the sense of infringing the kind of interest of the [owners] that the law of trespass protects").

9. See Albert, supra note 6, at 334 (documenting how investigative reporters broke "several major stories" by resorting to trespass).

10. See, e.g., Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 423–25, 441 (1982) (discussing New York appellate court's holding regarding one dollar statutory award of compensation for continuing trespass); *Food Lion*, 194 F.3d at 511, 519 (finding liability but limiting damages to one dollar for trespass claim).

11. See, e.g., *Desnick*, 44 F.3d at 1351–52 (creating exception for consensual, nonharmful entry, even when fraudulently obtained); State v. Shack, 277 A.2d 369, 374–75 (N.J. 1971) (creating exception for government workers to provide public health information to migrant farmworkers housed by employer).

and what the concomitant damages might be. This state of affairs generates considerable uncertainty,[12] as illustrated by the landscape of trespass cases in which courts continue to struggle to establish coherent boundaries defining the prerogative of owners to prevent and/or halt trespasses to land. With regard to media trespass cases, for instance, outcomes are notoriously hard to predict: Where trespassers have gained entry onto private property under false pretenses, courts have protected property owners against an individual posing as "a purported meter reader," and against a corporate spy posing as a customer in order to steal trade secrets from the firm's premises.[13] However, courts would probably not protect owners from a restaurant critic eating in a restaurant under a borrowed identity, from a browser in a store pretending to be interested in merchandise he cannot afford, or from customers in a car dealership's showroom who aggressively bargain with a salesperson by falsely claiming to have been offered a cheaper price by another vendor.[14] How can one distinguish between actionable trespass and instances where individual circumstances and social policies justify unauthorized entry? This Essay seeks to address this issue and redress the considerable uncertainty that permeates this area of law.

The Essay develops a new doctrinal framework that ascertains the limits of property owners' right to exclude third parties. Adapting the judicially created doctrine of fair use in copyright law,[15] it introduces the

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12. See, e.g., Jeremy Bentham, The Theory of Legislation 111–13 (C.K. Ogden ed., Richard Hildreth trans., Harcourt Brace Co. 1931) (1802) (referring to property as "nothing but a basis of expectation" and arguing laws must be understood to regulate expectation effectively); see also H.L.A. Hart, Positivism and the Separation of Law and Morals, 71 Harv. L. Rev. 593, 607–08 (1958) ("If a penumbra of uncertainty must surround all legal rules, then their application . . . cannot be a matter of logical deduction, and so deductive reasoning, which . . . has been cherished as the very perfection of human reasoning, cannot serve as a model for what judges, or indeed anyone, should do . . . ."); Jason Scott Johnston, Uncertainty, Chaos, and the Torts Process: An Economic Analysis of Legal Form, 76 Cornell L. Rev. 341, 341 (1991) ("One of the central concerns of contemporary post-Realist jurisprudence is legal determinacy—the ability to formulate legal rules that yield certain or at least predictable outcomes at least some of the time."). On legal uncertainty generally, see Anthony D'Amato, Legal Uncertainty, 71 Calif. L. Rev. 1, 2 (1983) (describing trend towards greater complexity); Isaac Ehrlich & Richard A. Posner, An Economic Analysis of Legal Rulemaking, 3 J. Legal Stud. 257, 257–58 (1974) (examining optimal level of rule precision or determinacy); Werner Z. Hirsch, Reducing Law's Uncertainty and Complexity, 21 UCLA L. Rev. 1233, 1233–34 (1974) (examining claim that making laws less complex benefits society).

13. *Desnick*, 44 F.3d at 1352.

14. Id. at 1351 (discussing these scenarios and concluding they would either be "privileged trespasses" or have "implied consent"); see also Gideon Parchomovsky & Alex Stein, Reconceptualizing Trespass, 103 Nw. U. L. Rev. 1823, 1853–54 (2009) (discussing *Desnick* opinion).

15. Now codified at 17 U.S.C. § 107 (2006). For a discussion of the statutory provisions, see infra notes 137–151 and accompanying text. Although this is not a crucial aspect of the proposal, a defendant could raise the fair trespass standard as an affirmative defense, as fair use is used in copyright law. Courts would only need to engage in the proposed analysis when the alleged trespasser raises the defense, which could reduce

concept of a "fair trespass" defense to property law doctrine. This Essay argues that courts should evaluate trespass actions on the basis of four discrete factors: (1) the nature and character of the trespass; (2) the nature of the protected property; (3) the amount and substantiality of the trespass; and (4) the impact of the trespass on the owner's property interest. These four factors are to be considered in sequence, with particular emphasis placed on the first factor. Specifically, if a court concludes on the basis of the first factor that social benefits do not accrue from a trespass action, no further investigation is needed. If, however, substantial benefits are involved, courts should proceed to consider each of the three remaining factors, weighing the relative importance of all four factors together just as courts do when applying the fair use doctrine.[16]

The main advantages of this proposal are as follows. First, this novel doctrine more carefully balances the access/exclusion tradeoff that exists in trespass law. The proposed doctrine would force courts to explicitly weigh the interests of society in access against the potential costs to property owners. Second, by replacing the existing patchwork of ad hoc situations where courts excuse trespassory acts, this proposal provides a more coherent and consistent framework to adjudicate trespass conflicts. In doing so, the suggested doctrinal changes will enable individuals to distinguish ex ante trespassory acts that are strongly discouraged from acts that should be excused. By developing a balancing test to assess trespass claims, the proposed doctrine seeks to protect the rights of property owners on the basis of a more explicit and predictable framework, while at the same time safeguarding the societal interests in access.

This Essay unfolds as follows: Part I reviews the basic doctrine of trespass law and discusses its limitations and shortcomings. Part II presents an overview of various areas of the law in which public access considerations currently moderate the right of exclusion of property owners. Drawing from these examples, this Part also reviews the societal interests involved in potential trespass disputes. Part III introduces a novel four-factor test for fair trespass. Part IV provides a few applications of the test for fair trespass. Part V addresses some potential criticisms, and Part VI concludes.

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overall administrative costs. This risks, however, losing some socially beneficial instances of trespass if the defendant somehow fails to raise the defense of fair trespass.

16. See, e.g., Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577–78 (1994) (explaining courts must consider and balance all parts of fair use doctrine in rendering a decision and that fulfilling one factor does not necessarily amount to showing of fair use); Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 455 n.40 (1984) ("Congress has plainly instructed us that fair use analysis calls for a sensitive balancing of interests.").

I. THE UNEASY CASE FOR A BRIGHT-LINE RULE IN TRESPASS

As conceived by Sir William Blackstone, a private property right consists of a bundle of rights.[17] Within this bundle of rights, the most important is the right to exclude, which enables owners to protect their investments in land.[18] For this reason, the right to exclude is generally understood as a crucial fixture of property rights systems.[19] Within the classical liberal tradition, strong and well-defined property rights are an indispensable precondition for well-functioning economic markets[20] and for the creation of wealth in society.[21] From this perspective, it is generally accepted that owners should be able to exclude strangers from the fruits of their labor, including investments in land.[22]

American property law reserves a relatively stringent doctrinal framework for trespass law, since an act of trespass is considered to be the most express violation of a landowner's fundamental right to exclude others from his or her property.[23] Principally, trespass law is a stringent form of

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17. While Blackstone is sometimes associated with an absolutist conception of property, see 2 William Blackstone, Commentaries *1–*2 (describing property right as "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe"), he actually conceived of property as consisting of a bundle of rights. See David B. Schorr, How Blackstone Became a Blackstonian, 10 Theoretical Inquiries L. 103, 109–10 (2009) (discussing Blackstone's exceptions to law of trespass and arguing they show Blackstone regarded property as collection of rights); see also Thomas J. Miceli, The Economic Approach to Law 162 (2004) (explaining bundle of property rights typically consists of rights to exclude, to use, and to dispose).

18. See Miceli, supra note 17, at 163 (explaining "[i]ncomplete property rights lead to inefficiencies of both *exchange* and *production*" such that to exchange and produce at socially optimal rates, owners "have to be confident that [they] alone have the legal right to sell [their] property, and . . . the exclusive rights to use it").

19. See Thomas W. Merrill, Property and the Right to Exclude, 77 Neb. L. Rev. 730, 747–52 (1998) (arguing right to exclude is defining characteristic of property).

20. See generally Hernando de Soto, The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else (2000) (arguing capitalism fails in developing countries because of lack of clear and precise property rights and system for recording them).

21. See generally Richard A. Epstein, How to Create—or Destroy—Wealth in Real Property, 58 Ala. L. Rev. 741 (2007) (explaining how clear-cut property rights, such as right to exclude, are necessary for accumulation of economic wealth in society).

22. See John Locke, Two Treatises of Government 287–88 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690) (arguing property rights are created by mixing labor with natural objects, e.g., by developing land); Robert Nozick, Anarchy, State, and Utopia 153–55 (1974) (claiming property rights are vested in people based on "fruits of their labor").

23. Joseph William Singer, Property 25 (3d ed. 2010) [hereinafter Singer, Property] ("The interest in 'exclusive possession' refers to the ability to prevent others from using or invading the property without the owner's or possessor's consent."). The classic example is Jacque v. Steenberg Homes, Inc., 563 N.W.2d 154, 160 (Wis. 1997) (finding actual harm in every intentional trespass worthy of at least nominal damage award, because intentional trespass violates property owner's right to exclude any other person from his or her land, regardless of reason); see also Poff v. Hayes, 763 So. 2d 234, 240 (Ala. 2000) ("[T]respass . . . 'is a wrong against the right of possession.'" (quoting Jefferies v. Bush, 608

liability applied to nonpermissive entries onto the land of another.[24] Generally, a cause of action may lie for trespass to land even if the defendant's trespass does not cause harm[25] and may even include incidents where the trespasser was unaware that he or she was entering the land owned by another.[26] Moreover, the tort of trespass does not require proof that the alleged trespasser forcibly entered the territory or that the trespass was committed for possessory purposes.[27] In addition, courts allow recovery for nonphysical trespasses, such as entry of smoke or sound disturbances.[28] The law grants a remedy for the aforementioned trespasses to protect against unwanted claims of easements and adverse possession.[29] Such remedies for acts of trespass are generally injunctive in nature.[30] Accordingly, entry "upon another's land" is not allowed, unless

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So. 2d 361, 362 (Ala. 1992))); Munsey v. Hanly, 67 A. 217, 217 (Me. 1907) ("The gist of the action of trespass quare clausum is the disturbance of the possession."); Lane v. Mims, 70 S.E.2d 244, 246 (S.C. 1952) ("[T]he action of trespass quare clausum fregit is founded upon possession . . . ."); Austin v. Hallstrom, 86 A.2d 549, 549 (Vt. 1952) ("The gist of the action of trespass upon the freehold is the injury to the possession.").

24. Restatement (Second) of Torts §§ 157–166 (1965).

25. See Dandoy v. Oswald, 298 P. 1030, 1031 (Cal. Ct. App. 1931) ("To hold that appellant is without remedy merely because the value of land has not been diminished [by contested trespass], would be . . . a denial of the principle that there is no wrong without a remedy."). In this respect, the tort of trespass to land differs from trespass to chattel, which requires an element of harm. Section 217 of the Restatement (Second) of Torts defines the tort of trespass to chattel as the intentional dispossession of a chattel belonging to another or the use of or the "intermeddling with a chattel in the possession of another." Restatement (Second) of Torts § 217. Section 218 of the Restatement recognizes a cause of action for dispossession or intermeddling that harms the chattel or an owner's chattel-related legal interests. Id. § 218; see also Jesse Dukeminier et al., Property Law 735–36 (7th ed. 2010) [hereinafter Dukeminier et al., 7th ed.] (pointing out courts have defined trespass as "'any intrusion which invades the possessor's protected interest in exclusive possession, whether that intrusion is by visible or invisible pieces of matter'" (quoting Martin v. Reynolds Metals Co., 342 P.2d 790, 794 (Or. 1959))).

26. See Singer, Property, supra note 23, at 28 (asserting that, to prove intentional trespass, "all plaintiff need show is that defendant intended to enter the plaintiff's land" and that "[i]t is irrelevant whether defendant knew she was entering land possessed by another"). See generally Restatement (Second) of Torts § 166 (noting potential liability for intrusions onto owner's property where such intrusions were negligent or caused by abnormally dangerous activities); Laura Quilter, The Continuing Expansion of Cyberspace Trespass to Chattels, 17 Berkeley Tech. L.J. 421, 427 n.52 (2002) (explaining trespasses committed unintentionally may still receive nominal damages).

27. See William J. Bowman & Patrick F. Hofer, The Fallacy of Personal Injury Liability Insurance Coverage for Environmental Claims, 12 Va. Envtl. L.J. 393, 410 (1993) ("[T]respass does not require proof that the trespasser used force to intrude on land, nor does it require proof that the trespasser intended to take possession.").

28. See Dan L. Burk, The Trouble With Trespass, 4 J. Small & Emerging Bus. L. 27, 33 (2000) (noting shrinking requirement of physical intrusion for trespass to land).

29. See Quilter, supra note 26, at 427 (explaining trespass law helps to protect owner's best interests by preventing adverse and unwanted claims on land).

30. See eBay, Inc. v. Bidder's Edge, Inc., 100 F. Supp. 2d 1058, 1067 (N.D. Cal. 2000) ("[A]n injunction is an appropriate remedy for a continuing trespass to real property."); MacMillan Bloedell, Inc. v. Ezell, 475 So. 2d 493, 498 (Ala. 1985) (concluding injunction appropriate but fails under circumstances of case).

prior permission has been obtained from the owner.[31] The law also distinguishes between intentional and unintentional encroachments, mostly with regard to the available remedies[32]: For instance, if a trespass is willful, the damages awarded are usually greater.[33] At the same time, nominal damages are often applied to unintentional trespasses.[34]

This straightforward approach to trespass disputes (ask for permission or else) seems beneficial in several ways. Foremost, the simplicity of the rule may align the expectations of owners and potential trespassers, reducing uncertainty in the process. Specifically, the strict liability trespass framework prevents potential trespassers from weighing the benefits of the trespass against the likely costs to the owner of the land. Instead, the rigid nature of the rule encourages potential trespassers to negotiate with landowners in order to secure a right of entry. For this reason, as scholars have noted, the current rule might be efficient.[35] This is all the more true because trespass incidents generally involve negligible negotiation costs, in that a trespasser typically may easily locate the owner of the land and negotiate the terms of entry. Additionally, by empowering the landowner, trespass doctrine validates the autonomy and discretion of a landowner to grant access to strangers, a principle illustrated by the dispute in *Jacque*.[36] In this (in)famous case, Jacque stubbornly refused to facilitate the delivery of a mobile home onto a nearby tract by denying passage over his land, though doing so would force Steenberg Homes's employees to take a potentially dangerous and expensive route over a mountain.[37] The Wisconsin Supreme Court upheld a jury's $100,000 damage award, holding that "when nominal damages are awarded for an intentional trespass to land, punitive damages may, in the discretion of the jury, be awarded."[38] The case illustrates the one-sided perspective of

31. See Desnick v. Am. Broad. Cos., 44 F.3d 1345, 1351 (7th Cir. 1995) ("To enter upon another's land without consent is a trespass."); 3 Blackstone, supra note 17, at *209 (explaining any entry onto land without permission is trespass).

32. See Michael L. Rustad & Thomas H. Koenig, Taming The Tort Monster: The American Civil Justice System as a Battleground of Social Theory, 68 Brook. L. Rev. 1, 24 (2002) (noting whether trespass is willful or unintentional may affect amount of damages awarded).

33. Cf. Jacque v. Steenberg Homes, Inc., 563 N.W.2d 154, 165 (Wis. 1997) ("Steenberg's egregious conduct could scarcely have been contemplated by the legislature when it enacted this statute which provides a penalty for simply 'entering or remaining' on the land of another.").

34. William L. Prosser, Handbook of the Law of Torts § 7, at 29 (3d ed. 1964) (explaining nominal damages may be awarded even though no actual damages occurred).

35. See Merrill, Costs of Determining, supra note 3, at 13–14 (noting because injunctions encourage ex ante negotiations in low transaction cost settings, strict liability property rules are most appropriate remedy in most typical trespass disputes); Henry E. Smith, Exclusion and Property Rules in the Law of Nuisance, 90 Va. L. Rev. 965, 968–69 (2004) (discussing role of information costs for selection of property rules).

36. 563 N.W.2d at 160 ("Private landowners should feel confident that wrongdoers who trespass upon their land will be appropriately punished.").

37. Id. at 157.

38. Id. at 166.

trespass doctrine. It remains the legal prerogative of property owners to exclude all others from their land, regardless of the reason for exercising this veto right—whether the decision is based on spite, opportunism, or mere caprice.

At the same time, however, this conception of trespass law opens the door to opportunistic behavior in situations in which the costs of a trespass to the landowner are low relative to the potential benefits for the trespasser, as *Jacque* itself illustrates. Examples such as *Jacque* suggest that trespass doctrine may actually be both inefficient and unfair. Concerns arise because of the unequal bargaining positions of the parties involved in a typical trespass dispute. As economists acknowledge, such unbalanced situations induce one-sided distributions and may also generate socially wasteful results: Because the trespasser often must accept the terms of the landholder, the latter can extract an elevated price, especially in cases where the difference between the costs to the landholder and the benefits to the trespasser are high.[39] The difference yields a rent or windfall profit for the landowner where negotiation succeeds, resulting from his or her strong bargaining position.[40] But the property owner's unilateral bargaining power also sets the stage for overly opportunistic behavior, such that bargaining fails and the potential trespasser has no recourse.[41] While the former situation might be unfair, the latter outcome is socially wasteful because joint gains are forsaken.

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39. See, e.g., Robert G. Crawford, Benjamin Klein & Armand A. Alchian, Vertical Integration, Appropriable Rents, and the Competitive Contracting Process, 21 J.L. & Econ. 297, 298–302 (1978) (explaining vertical integration as response to potential opportunistic behavior in conflict situations where relationship-specific investments are sunk by other party). The concern with absolute property right protection has also been raised on the basis of distributional concerns. See, e.g., Morris R. Cohen, Property and Sovereignty, 13 Cornell L.Q. 8, 27–30 (1927) (arguing property entitlements can confer equally despotic dominion over persons); Joseph William Singer, Legal Theory: Sovereignty and Property, 86 Nw. U. L. Rev. 1, 8 (1991) ("Seemingly neutral definitions of property rights by the courts distribute power and vulnerability in ways that construct illegitimate hierarchies based on race, sex, class, disability and sexual orientation.").

40. See, e.g., Thomas J. Miceli & C.F. Sirmans, An Economic Theory of Adverse Possession, 15 Int'l Rev. L. & Econ. 162, 162–65 (1995) (providing analogous good faith adverse possession example of landowner's windfall where he or she can capitalize on adverse possessor's improvements to property due to landowner's ability to evict adverse possessor).

41. In bilateral monopolies, situations where the bargaining occurs between a single buyer and seller, outcomes generally depend on the relative bargaining power of each party. However, without any market with competitive pricing, there is no guarantee that an agreement will be reached. See Robert Cooter, The Cost of Coase, 11 J. Legal Stud. 1, 28 (1982) (distinguishing between optimistic and pessimistic accounts of bargaining and explaining "strategic behavior sometimes results in noncooperative outcomes"). Bargaining failures occur, for instance, when rights holders overestimate the value at stake for the other party. See Lloyd Cohen, Holdouts and Free Riders, 20 J. Legal Stud. 351, 358–59 (1991) (distinguishing between dynamics of holdout and free riders in bargaining). In the literature that seeks to explain settlement failures, a distinction is made between litigation caused by situations where one of the parties either overestimates his or her legal claim (dissolving the bargaining range) and where a party overestimates his

On a broader level, like most bright-line rules, current trespass doctrine does not provide the necessary flexibility to consider all relevant issues involved in many trespass incidents. The absence of a balancing test keeps courts from explicitly addressing the potential private or social interests that might be furthered by acts of trespass. As a result, courts sometimes surreptitiously attempt to mitigate the rigid and sometimes harsh nature of the doctrine of trespass law. For example, courts sometimes implicitly pardon trespassing by limiting the award in a trespass action.[42] In other cases, courts sometimes create categorical exceptions to trespass, absolving nonconsensual entries onto another's land.[43] Both such attempts at infusing flexibility are problematic. Reduced trespass damage awards and context-specific trespass exceptions fail to provide a coherent analytical framework that would enable potential trespassers to establish ex ante whether their behavior will be excused or not.

Finally, and most significantly, the current doctrine of trespass formally recognizes only one type of interest in access: Individuals may jus-

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or her ability to extract a larger share from the opposing party (causing a bargaining breakdown). On information costs as an explanation for litigation, see, e.g., Keith N. Hylton, Asymmetric Information and the Selection of Disputes for Litigation, 22 J. Legal Stud. 187, 190 (1993) (presenting attempt to "extend[ ] the standard litigation model by taking into account informational constraints and efforts to rationally predict trial outcomes"); Kathryn E. Spier, The Dynamics of Pretrial Negotiation, 59 Rev. Econ. Stud. 93, 95–102 (1992) (developing model of sequential bargaining with one-sided, incomplete information). On strategic behavior as a cause of litigation, see Robert Cooter et al., Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior, 11 J. Legal Stud. 225, 227–34 (1982) (developing strategic model for analyzing settlement negotiations).

42. See Stockman v. Duke, 578 So. 2d 831, 832–33 (Fla. Dist. Ct. App. 1991) (finding no difference in value of land before and after trespass and thus reducing actual damages awarded by trial court to one dollar of nominal damages); Brown v. Smith, 920 A.2d 18, 32 (Md. Ct. Spec. App. 2007) (finding nominal damage award of $8,350 to trespass victim excessive and remanding to trial court to determine appropriate compensatory damages, if any); see also Thomas v. Harrah's Vicksburg Corp., 734 So. 2d 312, 321 (Miss. Ct. App. 1999) (holding plaintiff must prove defendant "acted with actual malice, gross negligence which evidences a willful, wanton or reckless disregard for the safety of others, or committed actual fraud" to receive punitive damages); Shiffman v. Empire Blue Cross & Blue Shield, 681 N.Y.S.2d 511, 512 (N.Y. App. Div. 1998) (finding no punitive damages available when reporters gain entrance to medical clinic fraudulently because entry was not motivated by malice); Tex. Elec. Serv. Co. v. Linebery, 333 S.W.2d 596, 599 (Tex. Civ. App. 1960) (holding actual damages must be recoverable before exemplary damages may be awarded).

43. See, e.g., Desnick v. Am. Broad. Cos., 44 F.3d 1345, 1351 (7th Cir. 1995) (noting concepts of privilege and implied consent have diluted rule that entering another's land without consent is trespass); Fla. Publ'g Co. v. Fletcher, 340 So. 2d 914, 917–19 (Fla. 1976) (noting news reporters entering burning property have implied consent due to customary usage of property at time of emergency); West v. Faurbo, 384 N.E.2d 457, 458 (Ill. App. Ct. 1978) (noting private necessity privilege exception to trespassing is created when trespasser has immediate need to enter land); see also Northside Realty Assocs. v. United States, 605 F.2d 1348, 1355 (5th Cir. 1979) (finding government agents investigating violations of Fair Housing Act were not trespassers because they behaved exactly as prospective home buyers visiting real estate office would be expected to behave).

tify interference with private property in situations where a nonowner needs to protect him or herself, his or her property, or the life or property of a third person.[44] The doctrine of private necessity grants a privilege to enter or remain on land in the possession of another "if it is or reasonably appears to be necessary to prevent serious harm to . . . the actor, or his land or chattels."[45] In cases involving private necessity claims, courts generally apply the doctrine in a restrictive manner.[46] In order to prevail on the defense of private necessity, no other, safer option may be available, and one must not only reasonably believe in the threat of harm, but the trespassory acts taken to avoid that threat must also be reasonable.[47] However, as will be discussed in Part II, intentional acts of trespass outside the context of such potential harm may often achieve private benefits as well as engender substantial public benefits, such as the discovery of information important to public health or safety.

Part II illustrates the ways in which our legal system more broadly qualifies the right to exclude in a manner that balances the privilege of exclusion against the interests in access. Surveying the rights and duties of real property owners in a varying set of circumstances, Part II demonstrates that limitations on the right of exclusion are more common than generally acknowledged and argues that many of the public interest considerations present in these areas of law are potentially relevant in the context of trespass by individuals as well. Part II concludes with an analysis of the various public interest issues involved in trespass disputes. Part III then introduces a novel doctrinal test that aligns the law of trespass with the needs of modern society.

II. PROPERTY LAW'S QUALIFIED RIGHT TO EXCLUDE

Under the Blackstone conception of a private property right, the right to exclude is the most important part in the owner's bundle of rights.[48] As described above, it is generally accepted that owners should be able to exclude strangers from the fruits of their labor, including in-

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44. W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 24, at 147–48 (5th ed. 1984) (describing doctrine of necessity in trespass law).

45. Restatement (Second) of Torts § 197 (1965).

46. For a case law overview, see United States v. Schoon, 955 F.2d 1238, 1239–40 (9th Cir. 1991) (describing various cumulative conditions for applying doctrine of necessity); see also Singer, Property, supra note 23, at 38 (describing various requirements for necessity, including being "faced with a choice of evils and [choosing] the lesser," presence of "imminent harm," "direct causal relationship" between conduct and harm, and "no legal alternatives to violating the law").

47. Lange v. Fisher Real Estate Dev. Corp., 832 N.E.2d 274, 279 (Ill. App. Ct. 2005) (describing requirements of private necessity justification and finding them unmet where taxi driver was unthreatened by his passenger but pursued "fleeing fare" onto owner's property).

48. See 3 Blackstone, supra note 17, at *209 ("[E]very man's land is in the eye of the law enclosed and set apart from his neighbour's . . . ."); see also Shyamkrishna Balganesh, Demystifying the *Right* to Exclude: Of Property, Inviolability, and Automatic Injunctions, 31 Harv. J.L. & Pub. Pol'y 593, 596 (2008) ("The idea of exclusion, in one form or the

vestments in land,[49] and to this end, Anglo American property law employs a relatively strict doctrinal framework precluding entry "upon another's land" unless prior permission has been obtained from the owner.[50]

Although the strict framework of rules in trespass law creates the impression of an absolute right to exclude, it belies the actual balance of rights of entry and exclusion across a broad range of property law disputes. First, as mentioned above, courts already make context-specific and remedy-related exceptions to excuse certain acts of trespass.[51] Second, and more fundamentally, the view of exclusion as an absolute right fails to appreciate the broader social and legal context of exclusionary rights in the American property law system. Specifically, when reflecting on exclusionary rights across various areas of law, it is difficult to avoid the conclusion that a property owner's right to exclude is, in actuality, quite relative.[52]

A varied set of legal doctrines in various areas of law illustrates how the invasion of another's property can generally be justified if it protects or advances certain public interests.[53] Hence the term "qualified exclusion" more accurately describes the exclusionary powers of property owners in the legal system overall. The following subsections provide a few examples drawn from property law, constitutional law, and criminal law.

A. *Exclusion and Private Takings*

Many property law doctrines impose time-based limitations on property owners' exclusionary powers. Far from being absolute, the exclusionary rights of property holders are conditional upon an affirmative duty to exercise these rights in certain circumstances.

Under the doctrine of prescriptive easements, for example, a property owner loses the absolute right to exclude when a nonowner has used the land openly, peaceably, continuously, and under a claim of right adverse to the owner for a period set forth by a particular state (known as the prescription period).[54] Property owners who fail to exercise the privilege of exclusion at regular intervals may lose the exclusive *use* of specific

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other, tends to inform almost *any* understanding of property, whether private, public, or community.").

49. See supra notes 17–22 and accompanying text (describing various conceptions of property right and preeminence of right to exclude).

50. See 3 Blackstone, supra note 17, at *209 (explaining any entry onto land without permission is trespass).

51. See supra notes 10–11, 42–43, and accompanying text (discussing manner by which courts carve out exceptions to trespass, or at least limit damages significantly).

52. See infra Part II.A–C.

53. See infra Part II.D.

54. Restatement (Third) of Prop.: Servitudes §§ 2.15, 2.17 (2000); see also Holbrook v. Taylor, 532 S.W.2d 763, 764 (Ky. 1976) (citing Grinestaff v. Grinestaff, 318 S.W.2d 881 (Ky. 1958), for elements of easement and noting easements can attach "by express written grant, by implication, by prescription, or by estoppel"); Michael V. Hernandez, Restating

parts of their property for specific purposes.[55] Many states have set a ten-year prescription period during which a property owner must, at least once, exercise the right to exclude open, recurring trespassers,[56] and failure to do so extinguishes the right to exclude with regard to the specific use of the property in which the nonowner was engaged.[57] In this manner, an act of trespass, such as the regular use of a passageway through land, can create a vested right and effectively terminate the absolute right of the owner to exclude.[58] Acts of trespass can also create vested rights if a court finds that the claimed easement is necessary to the enjoyment of the claimant's land and that the necessity arose from the severance of the claimed dominant parcel from the claimed servient parcel.[59] While most courts require strict necessity,[60] several courts have applied a lesser standard, granting easements by necessity if access would otherwise be inadequate, difficult, or costly.[61]

Implied, Prescriptive, and Statutory Easements, 40 Real Prop. Prob. & Tr. J. 75, 103–05 (2005) (summarizing law and history of prescriptive easements).

55. Jesse Dukeminier et al., Property, 696–99 (6th ed. 2006) [hereinafter Dukeminier et al., 6th ed.] (noting historical development through case law of prescriptive easements to protect regular uses of land).

56. Interior Trails Pres. Coal. v. Swope, 115 P.3d 527, 530 (Alaska 2005) (requiring ten-year period of continuous use to establish prescriptive easement); see also Warsaw v. Chi. Metallic Ceilings, Inc., 676 P.2d 584, 589 (Cal. 1984) ("[I]f the requisite elements of a prescriptive use are shown[,] '[s]uch use for the five-year statutory period . . . confers a title by prescription.'" (quoting Taormino v. Denny, 463 P.2d 711, 714 (Cal. 1970))); McDonald v. Sargent, 13 N.W.2d 843, 844 (Mich. 1944) (requiring unopposed, continuous trespass for fifteen years). For an overview, see generally Hernandez, supra note 54, at 106–07.

57. Dukeminier et al., 6th ed., supra note 55, at 699.

58. Id.

59. In order to establish an easement by necessity, three conditions must be fulfilled: (1) There must have been a unity of ownership of the alleged dominant and servient estates at one time; (2) the use must be a necessity, not a mere convenience; and (3) the necessity must have existed at the time of severance of the two estates. Restatement (Third) of Prop.: Servitudes § 2.15.

60. See, e.g., Othen v. Rosier, 226 S.W.2d 622, 625–26 (Tex. 1950) (finding no implied easement because petitioner had not made requisite showing that roadway in use "was a necessity on the date of [the severance], rather than a mere convenience"); Schwab v. Timmons, 589 N.W.2d 1, 6–9 (Wis. 1999) (finding no easement by necessity where petitioner could access allegedly landlocked parcel by use of public road and deeming cost of accessing said road directly to and from parcel irrelevant).

61. See, e.g., Ill. Dist. of Am. Turners, Inc. v. Rieger, 770 N.E.2d 232, 243–44 (Ill. App. Ct. 2002) ("The owner of an easement is entitled to full enjoyment and every right connected to the enjoyment of the easement but has no right to interfere with the landowner's control and beneficial use of the land *further than is necessary for the reasonable enjoyment of his easement.*" (emphasis added)); Weaver v. Cummins, 751 N.E.2d 628, 632 (Ill. App. Ct. 2001) ("Requiring plaintiffs to install culverts, build a pond, and bring in large amounts of fill to construct a potentially dangerous road is unreasonable when a road over defendants' property exists to allow plaintiffs safe access to the public road."); McCumbers v. Puckett, 918 N.E.2d 1046, 1051 (Ohio Ct. App. 2009) (describing prescriptive easement as extending to whatever "'is reasonably necessary and convenient to serve the purpose for which the easement was granted'" (quoting Crane Hollow, Inc. v. Marathon Ashland Pipe Line, LLC, 740 N.E.2d 328, 334 (Ohio Ct. App. 2000))).

Similarly, the doctrine of estoppel abrogates a property owner's absolute right of exclusion when a person with a license to use land "has exercised the privilege given him and erected improvements or made substantial expenditures on the faith or strength of the license."[62] If reliance on the prior use has induced investments on behalf of the possessor, the license may "become[ ] irrevocable . . . [and] will continue for so long a time as [its] nature . . . calls for."[63]

Temporal qualifications to the right of exclusion also feature prominently in the doctrine of adverse possession.[64] This doctrine imposes on property owners an affirmative duty to exercise their exclusionary rights when a nonowner takes possession of or occupies the owner's land.[65] States have set statutes of limitations for bringing an action against trespassing possessors.[66] After the passage of the statutorily defined time limit, further action by the owner is barred and a *new* title is vested in the adverse possessor.[67] Once acquired, the new title relates back to the

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62. McCoy v. Hoffman, 295 S.W.2d 560, 561 (Ky. 1956); see also *McCumbers*, 918 N.E.2d at 1050 (citing relevant precedent that indicated "easement by estoppel may be created where a landowner, without objection, permits another to expend money in reliance upon a supposed easement, when in justice and equity the former ought to have asserted his conflicting rights, and therefore should be estopped to deny the easement"). The Restatement provides:

> If injustice can be avoided only by establishment of a servitude, the owner or occupier of land is estopped to deny the existence of a servitude burdening the land when: (1) the owner or occupier permitted another to use that land under circumstances in which it was reasonable to foresee that the user would substantially change position believing that the permission would not be revoked, and the user did substantially change position in reasonable reliance on that belief; or (2) the owner or occupier represented that the land was burdened by a servitude under circumstances in which it was reasonable to foresee that the person to whom the representation was made would substantially change position on the basis of that representation, and the person did substantially change position in reasonable reliance on that representation.

Restatement (Third) of Prop.: Servitudes § 2.10.

63. Stoner v. Zucker, 83 P. 808, 810 (Cal. 1906).

64. Although there are many functional analogies between adverse possession, on the one hand, and prescriptive easements and estoppel, on the other hand, the latter doctrines involve entitlements to specific uses of the property, while the former pertains to the ownership of a land parcel. See Dukeminier et al., 6th ed., supra note 55, at 112–43 (explaining history, purpose, and doctrinal aspects of adverse possession).

65. See John W. Reilly, The Language of Real Estate 14 (5th ed. 2000) (noting defeating adverse possession claims requires owner to take affirmative steps such as "reentry, an action for ejectment or an action to quiet the title").

66. See 16 Richard R. Powell, Powell on Real Property § 91.10[1] (Michael Allan Wolf ed., 2007) (discussing origins and history of statutes of limitations for adverse possession). For an overview of state statutes of limitations, see Matthew Baker et al., Property Rights by Squatting: Land Ownership Risk and Adverse Possession Statutes, 77 Land Econ. 360, 366 (2001).

67. See Dukeminier et al., 6th ed., supra note 55, at 115.

event that commenced the tolling of the statute,[68] and the effective date of the new title is the date of "first adverse entry."[69]

Courts have developed a series of cumulative requirements for finding adverse possession, all of which can be viewed as promoting adequate opportunity for a property owner to obtain notice and to exercise his exclusionary powers. Under these requirements, there must be actual entry, leading to exclusive possession under a claim of right that is open, notorious, continuous, and uninterrupted for the statutory period.[70]

B. *Exclusion and Public Rights*

Important qualifications to the power of exclusion also follow from society's interest in protecting certain fundamental rights of the public on private land, even if the protection goes against the interest and agreement of the private landowner.[71] Access is granted generally based on either the nature of the property trespassed upon or the nature of the public interests being asserted to justify access.

Following a voluminous body of case law, landowners who open their land to the public consequently face wide-ranging restrictions on the right to exclude that follow from state and federal constitutional protections of fundamental rights, such as (but not limited to) discrimination, equal protection, and free speech.[72] The overview below illustrates some of the qualifications of exclusion in the context of publicly accessible private land.

First, the right to exclude can be abrogated due to the *semipublic status* of the private property involved. The case of *Doe v. Bridgeton Hospital Ass'n* provides an example.[73] In *Bridgeton* pregnant women and their doctors brought an action against various nonsectarian hospitals, seeking to

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68. Id.

69. Reilly, supra note 65, at 13.

70. Dukeminier et al., 6th ed., supra note 55, at 124; see, e.g., Roberts v. Feitz, 933 N.E.2d 466, 480 (Ind. Ct. App. 2010) (stating requirements of adverse possession as "control, intent, notice and duration [ ] for a period of ten years" but finding no adverse possession because possession was "well under the statutory requirement for adverse possession"); Evanich v. Bridge, 893 N.E.2d 481, 483 (Ohio 2008) ("[T]o succeed in acquiring title by adverse possession, the claimant must show exclusive possession that is open, notorious, continuous, and adverse for [the statutory period of] 21 years."). A common generalization about entry and exclusive possession is that it must be the "use of the property in the manner that an average true owner would use it under the circumstances." Dukeminier et al., 6th ed., supra note 55, at 125.

71. For an illuminating overview and historical description of public access rights, see Joseph William Singer, No Right to Exclude: Public Accommodations and Private Property, 90 Nw. U. L. Rev. 1283, 1303–411 (1996) [hereinafter Singer, No Right to Exclude].

72. See U.S. Const. amend. V ("No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ."); id. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

73. 366 A.2d 641 (N.J. 1976).

compel the hospitals to make their facilities available to them in order to conduct elective abortions.[74] The New Jersey Supreme Court held that the hospitals had a "quasi-public" status due to the broad role of these institutions in society.[75] As a result of that status, the Supreme Court held that the hospitals could not refuse entry to women seeking elective abortions.[76] Similarly, a series of landmark civil rights cases analogizes private businesses, such as restaurants and motels, to state actors and consequently imposes on them limitations on the right to exclude.[77] This requirement of public accommodation is represented most strongly in a New Jersey Supreme Court decision holding that property owners who open their premises to the general public in the pursuit of their property interests have no right to exclude people unreasonably.[78]

Second, courts have also qualified the right to exclude under circumstances where the *nature* of the rights at play opposite a property owner's decision to exclude are particularly vital. In *State v. Shack*, for instance, the New Jersey Supreme Court held that a property owner could not exclude nonprofit workers from meeting with or providing services to mi-

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74. Id. at 642–43. The board of trustees for each hospital selected a policy of permitting only therapeutic abortions. Id. at 643.

75. Id. at 645 ("The properties of these hospitals are devoted to a use in which the public has an interest and are subject to control for the common good."). Moreover, the court in *Bridgeton* analogized hospitals to common carriers, arguing that common carriers are not allowed to refuse entry to individuals unless there is some rational basis for doing so. Id. at 646 (noting common carriers had to "receive and lodge all comers in the absence of a reasonable ground of refusal," such as lack of space).

76. Id. at 645.

77. In the context of the Equal Protection Clause of the Fourteenth Amendment of the Constitution, privately owned restaurants have been required to grant general access to the public. For example, in *Burton v. Wilmington Parking Authority*, the Supreme Court concluded that a restaurant's refusal to serve an African American man based on his race constituted "discriminatory state action in violation of the Equal Protection Clause of the Fourteenth Amendment." 365 U.S. 715, 717 (1961). While the Constitution only bans discriminatory policies that are conducted by the state, the Court concluded that the restaurant was a state actor, and thus subject to the restraints of the Constitution, because of the peculiar relationship between the city's parking authority and the restaurant. Id. at 724.

78. Uston v. Resorts Int'l Hotel, Inc., 445 A.2d 370, 375 (N.J. 1982) (holding that, unless provided otherwise by applicable gambling regulation, casino owners have right and duty to exclude from their casinos only those who "'disrupt the regular and essential operations of the premises'" (alteration omitted) (quoting State v. Schmid, 423 A.2d 615, 631 (N.J. 1980))). But some courts, in a contrary trend, have held that public accommodation duties do not extend beyond common carriers to include all businesses, such as retail stores and supermarkets. See, e.g., Brooks v. Chi. Downs Ass'n, 791 F.2d 512, 517–19 (7th Cir. 1986) (denying public accommodation right because reputation and competitive effects provide reassuring incentives to businesses not to exclude unreasonably); Uston v. Airport Casino, Inc., 564 F.2d 1216, 1217 (9th Cir. 1977) ("The policies upon which the innkeeper's special common law duties rested are not present in [a relationship between a casino owner and prospective gambler]."). For a discussion of public accommodation rights, see Singer, No Right to Exclude, supra note 71, at 1404 (documenting history of public accommodation rights and duties).

grant workers living on the property owner's farm.[79] The court asserted that an owner's right in his property is not absolute and that "it has long been true that necessity, private or public, may justify entry upon the lands of another."[80] Moreover, the court concluded that "ownership of real property does not include the right to bar access to governmental services available to migrant workers and hence there was no trespass" when nonprofit workers entered the property of the farm owner.[81] *Shack* illustrates how courts can "reconfigure . . . property rights in light of public policies that emanate from state constitutional norms."[82] This potential discretion of courts is further demonstrated in a contentious series of cases involving the exercise of state constitutional free speech rights[83] by protesters at the entrance of shopping malls, warehouses, and university campuses.[84] Most famously, in *Pruneyard Shopping Center v. Robins*, the

79. 277 A.2d 369, 371–72 (N.J. 1971). This is an example of a situation where the mere presence of nonowners on the land negated the property owner's rights of exclusion.

80. Id. at 373.

81. Id. at 371–72.

82. Helen Hershkoff, The New Jersey Constitution: Positive Rights, Common Law Entitlements, and State Action, 69 Alb. L. Rev. 553, 553 (2006). According to some commentators, *Shack* represents an instance where "private use and enjoyment is subject to a set of highly indeterminate collective interests to be defined and weighed case by case." Emily Sherwin, Two- and Three-Dimensional Property Rights, 29 Ariz. St. L.J. 1075, 1094 (1997); see also Michele Cortese, Property Rights and Human Values: A Right of Access to Private Property for Tenant Organizers, 17 Colum. Hum. Rts. L. Rev. 257, 268 (1986) ("The *Shack* decision focused on the human values served by granting access to farm property, and weighed them against the owner's property rights."). By forcing a landowner to open his property to government workers seeking to help migrant employees, *Shack* exemplifies the courts' willingness to extend state constitutional rights into the private sphere. Id.; see also Folgueras v. Hassle, 331 F. Supp. 615, 623 (W.D. Mich. 1971) (holding owner of migrant labor camps "may not constitutionally deprive the migrant laborers living in his camps, or members of assistance organizations, or mere visitors of reasonable access to his camps"); State v. DeCoster, 653 A.2d 891, 895 (Me. 1995) (upholding injunction prohibiting employer from "placing or maintaining a sign in front of DeCoster housing instructing persons either not to enter, not to trespass, or to seek permission from the office before visiting" (internal quotation marks omitted)); Baer v. Sorbello, 425 A.2d 1089, 1090 (N.J. Super. Ct. App. Div. 1981) (entertaining plaintiff's defense to counterclaim for trespass on basis of *Shack* where state legislator had entered private farm for purpose of inspection); Freedman v. N.J. State Police, 343 A.2d 148, 151 (N.J. Super. Ct. Law Div. 1975) (holding rights of migrant farm workers to receive visitors and rights of newspaper reporters and other visitors "must be exercised reasonably").

83. Unlike the First Amendment, which protects free speech as a negative right, U.S. Const. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . . ."), many state constitutions grant free speech as an affirmative right. See, e.g., Ohio Const. art. I, § 11 ("Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of the right . . . ."). Over forty state constitutions grant an affirmative right to free speech. Joseph H. Hart, Free Speech on Private Property—When Fundamental Rights Collide, 68 Tex. L Rev. 1469, 1470 (1990). Some of those states have granted the right to free speech on private property, while others have not. Id. at 1474 n.31 (describing various courts' treatment of state free speech rights on private property).

84. See Green Party of N.J. v. Hartz Mountain Indus., Inc., 752 A.2d 315, 321–32 (N.J. 2000) (analyzing variety of court tests for balancing rights of citizens to speak and assemble

United States Supreme Court affirmed the California Supreme Court's refusal to enjoin high school students from handing out information outside a privately owned shopping mall, holding that protecting free speech in such a context is more important than protecting the landowner's right to exclude.[85] In its opinion, the California Supreme Court balanced the rights of the property owner against society's interest in enabling free speech on private but publicly accessible property and decided

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freely with private property rights of owners, and declaring unconstitutional private shopping mall rule requiring $1 million insurance policy to allow leafletting); see also infra text accompanying notes 85–94 (providing additional examples of courts finding state constitutional violations). Several other states have rejected this approach. See, e.g., Whole Foods Mkt. Grp., Inc. v. Sarasota Coal. for a Living Wage, No. 2007 CA 002208 NC, 2010 WL 2380390, ¶¶ 2–3, 5, 13, 18–19, 21 (Fla. Cir. Ct. Mar. 31, 2010) (finding private entity engaged in business on private property entitled to exercise its antisolicitation policy on interior sidewalk at entrance to its grocery store); Cahill v. Cobb Place Assocs., 519 S.E.2d 449, 450 (Ga. 1999) (affirming lower court in deciding state constitutional free speech guarantee did not prevent shopping mall owner from prohibiting distribution of religious literature in violation of mall policy); Estes v. Kapiolani Women's & Children's Med. Ctr., 787 P.2d 216, 220–21 (Haw. 1990) (finding hospital policy preventing distribution of leaflets and other antiabortion expression was not state action within meaning of free speech guarantee); People v. DiGuida, 604 N.E.2d 336, 346 (Ill. 1992) (finding prosecution of defendant for criminal trespass based on solicitation of signatures for political petition on private grocery store's property did not violate free speech clause of Illinois Constitution absent showing that store had "presented itself as a forum for free expression"); Southcenter Joint Venture v. Nat'l Democratic Policy Comm., 780 P.2d 1282, 1285 (Wash. 1989) (holding "[t]he free speech provision of the Constitution of the State of Washington . . . does not protect an individual against the actions of other private individuals" and "thus does not afford . . . a constitutional right to solicit contributions and sell literature at the mall").

85. 592 P.2d 341 (Cal. 1979), aff'd, 447 U.S. 74, 88 (1980). With this decision, the California courts went against the federal trend, which had established that federal law does not grant free speech rights on private property unless that property has completely taken on all the characteristics of public property. See, e.g., Marsh v. Alabama, 326 U.S. 501, 507–09 (1946) (finding company-owned town is governed by same federal constitutional constraints as municipality where citizens in company-owned towns have as much interest in and right to information enabling them to act as any other citizens). On the federal level, a few early discussions favored access for the purpose of free speech. For example, in *Marsh*, the Supreme Court allowed Jehovah's Witnesses to distribute literature in the business district of a company-owned town, because the town functioned like any other public town. *Marsh*, 326 U.S. at 502, 507–09. Then, in *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza Inc.*, the Court extended *Marsh* and allowed picketing in a privately owned shopping center because the center was the "functional equivalent" of the *Marsh* business district. 391 U.S. 308, 318 (1968), abrogated by Hudgens v. NLRB, 424 U.S 507 (1976). These cases were overturned by *Hudgens*, 424 U.S. 507 (holding federal law does not grant free speech rights on private property unless that property has completely taken on all characteristics of public property), and Lloyd Corp. v. Tanner, 407 U.S. 551 (1972) (finding picketing at privately owned mall used solely for private purposes was not protected free speech under federal constitution). The Court, however, stated that *Lloyd* does not limit states from expanding their own constitutions to grant greater individual liberties. *Pruneyard*, 447 U.S. at 81 ("Our reasoning in *Lloyd*, however, does not . . . limit the authority of the State to exercise its police power or its sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution.").

in favor of the demonstrators.[86] The Supreme Court analyzed several factors, including "the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations."[87] The Court found that the right to free speech in the mall did not unreasonably prevent the owners from operating the business or devalue the property.[88]

In *State v. Schmid*, the New Jersey Supreme Court protected a right to distribute leaflets on a private university campus based on a three-part balancing test to determine whether the affirmative right of free speech granted in the New Jersey Constitution protected against an action of trespass.[89] The first factor involves consideration of "the nature, purposes, and primary use" of the property.[90] The second factor assesses "the extent and nature of the public's invitation to use [the] property."[91] The third and final factor evaluates "the purpose of the expressional ac-

86. See *Pruneyard*, 592 P.2d at 346–48 ("We conclude that . . . the California Constitution protect[s] speech and petitioning, reasonably exercised, in shopping centers even when the centers are privately owned.").

87. *Pruneyard*, 447 U.S. at 83. These factors share some common ground (especially the first and last factor) with the general, four-factor balancing test proposed in Part III.C, infra. This test determines more generally whether to excuse trespassory acts when the social interests in access outweigh the costs to the property owner, based not on the test first developed in *State v. Schmid* as articulated in *Pruneyard*, but rather on the fair use balancing standard developed in copyright law.

88. *Pruneyard*, 447 U.S. at 83 ("There is nothing to suggest that preventing appellants from prohibiting this sort of activity will unreasonably impair the value or use of their property as a shopping center."). By contrast, in *Golden Gateway Center v. Golden Gateway Tenants Ass'n*, the California Supreme Court denied free speech rights in a private apartment complex. 29 P.3d 797, 810 (Cal. 2001) ("[T]he Complex, unlike the shopping center in [*Pruneyard*], is not the functional equivalent of a traditional public forum."). In addition, several appellate court decisions denied the existence of free speech rights in large stores and supermarkets, distinguishing *Pruneyard* most often by finding that the individual stores did not open themselves up for use as public property. See, e.g., Lushbaugh v. Home Depot U.S.A., Inc., 113 Cal. Rptr. 2d 700, 704 (Ct. App. 2001) (finding Home Depot store did not encourage public to linger on its premises because it "provided little beyond a hot dog stand and classes directly related to marketing its home improvement products"); Trader Joe's Co. v. Progressive Campaigns, 86 Cal. Rptr. 2d 442, 449 (Ct. App. 1999) (finding Trader Joe's was not public meeting place or forum because it contained no plazas, walkways, connections to other establishments, or a central courtyard where patrons could congregate and spend time together). Malls were distinguishable because they invited people to come to the mall and congregate. See, e.g., Savage v. Trammell Crow Co., 273 Cal. Rptr. 302, 312 (Ct. App. 1990) (finding Del Norte Plaza accessible location to promote ideas because, though it was smaller than shopping center in *Pruneyard*, both plazas included retail shops, restaurants, and cinemas); see also Adrienne Iwamoto Suarez, Covenants, Conditions, and Restrictions . . . on Free Speech? First Amendment Rights in Common-Interest Communities, 40 Real Prop. Prob. & Tr. J. 739, 750–51 (2006) (discussing procedural posture of *Pruneyard*). However, in 2007, the California Supreme Court reaffirmed *Pruneyard* in Fashion Valley Mall v. NLRB, 172 P.3d 742, 745–46 (Cal. 2007).

89. 423 A.2d 615, 630 (N.J. 1980).

90. Id.

91. Id.

tivity undertaken . . . in relation to both the private and public use of the property."[92] In *New Jersey Coalition Against War in the Middle East v. J.M.B. Realty Corp.*, the court extended this approach to include free speech rights *inside* privately owned shopping centers.[93] Finally, in *Guttenberg Taxpayers and Rentpayers Ass'n v. Galaxy Towers Condominium Ass'n*, the New Jersey courts further extended the right of access to include engaging in free speech inside a privately owned condominium association.[94]

C. *Exclusion and Public Takings*

Finally, a diverse set of doctrines in property law extinguishes the exclusionary autonomy of property owners, transferring ownership to the government or to publicly dedicated uses of land in light of more prominent social interests in obtaining access to a landowner's property. Specifically, broad social interests figure prominently whenever state regulatory powers are involved. For example, search and seizure provisions qualify the right of exclusion of private landowners in situations where the government is seeking to protect public safety and enforce the rule of law.[95] These provisions, along with customary laws, the law of exactions, the law of eminent domain, and others, comprise a vast body of law that

92. Id.

93. 650 A.2d 757, 761 (N.J. 1994). The court applied the first two *Schmid* factors, concluding that the shopping center was largely for public use and that the general public was invited to go into the premises for any purpose. Id. As to the third factor, the court concluded that the leafletting could not have been contrary to the normal use of the property because the property owners invited everyone onto the property for any purpose. Id. In addition to the *Schmid* test, the court also weighed free speech rights against the owner's private property rights, stating that an owner loses private property rights as the public use of the property increases. Id. at 775. In this case, the shopping center was open for use by anyone, and therefore the protestor's actions could not further reduce the owner's private property rights. Thus, the balance weighed heavily in favor of free speech. Id. at 775–76. Note that, up until that point, no other court had granted such rights inside private property. See Armando A. Flores, Free Speech and State Constitutional Law: Recent Developments, Developments in State Constitutional Law: 1994, 26 Rutgers L.J. 1000, 1001 (1995) ("In *New Jersey Coalition Against War in the Middle East v. J.M.B. Realty Corp.*, New Jersey became the first state to recognize the right of its citizens to engage in leafletting inside enclosed, privately-owned, regional shopping centers.").

94. 688 A.2d 156, 159 (N.J. Super. Ct. Ch. Div. 1996) ("A level playing field requires equal access to this condominium because it has become in essence a political company town . . . in which political access controlled by [Galaxy Towers] is the only game in town." (internal quotation marks omitted)). The condominium association had previously allowed politicians to distribute campaign flyers within the community. Id. at 157. As a result, the court held that the association had opened its property for public use and that it therefore had to allow others to distribute information to the residents. Id. at 159.

95. For example, in *New Jersey v. T.L.O.*, the Supreme Court stated:

> Although the underlying command of the Fourth Amendment is always that searches and seizures be reasonable, what is reasonable depends on the context within which a search takes place. The determination of the standard of reasonableness governing any specific class of searches requires "balancing the need to search against the invasion which the search entails." On one side of the balance are arrayed the individual's legitimate expectations of privacy and

obliges owners to grant access to their property. In some instances, a property owner may receive just compensation[96] in return for relinquishing exclusionary interests, but in many other instances these doctrines extinguish exclusionary rights without any form of compensation.

First, the public trust doctrine reserves public access rights to private property under various circumstances. For instance, in a series of cases relating to coastal beach areas, courts have held that public access rights trump private property rights on private beaches,[97] privately owned dry sand beach areas,[98] and upland sand areas.[99] This set of rules qualifies exclusion in order to preserve a public right to beach access and recreation.[100]

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personal security; on the other, the government's need for effective methods to deal with breaches of public order.

469 U.S. 325, 337 (1985) (citation omitted) (quoting Camara v. Mun. Court, 387 U.S. 523, 536–37 (1967)).

96. The Fifth Amendment of the United States Constitution contains important protections against federal confiscation of private property. It states: "No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V.

97. For a few examples where courts have recognized customary rights of access in beach areas, see, e.g., City of Daytona Beach v. Tona-Rama, Inc., 294 So. 2d 73, 78 (Fla. 1974) (holding oceanfront property owner cannot interfere with recreational use of sandy area of beach adjacent to "mean high tide" if public use of said area is "ancient, reasonable, without interruption and free from dispute"); Stevens v. City of Cannon Beach, 854 P.2d 449, 456 (Or. 1993) ("When plaintiffs took title to their land, they were on notice that exclusive use of the dry sand areas was not a part of [their] 'bundle of rights' . . . because public use of dry sand areas 'is so notorious that notice of the custom . . . must be presumed.'" (quoting State ex rel. Thornton v. Hay, 462 P.2d 671, 678 (Or. 1969))); Matcha v. Mattox, 711 S.W.2d 95, 97, 101 (Tex. App. 1986) (finding public acquired easement by custom on beach in vicinity of owners' property after hurricane moved natural line of vegetation landward).

98. See, e.g., Matthews v. Bay Head Improvement Ass'n, 471 A.2d 355, 362–63 (N.J. 1984) (noting public trust doctrine historically extended to use of land below "mean average high water mark where the tide ebbs and flows" and "[i]n order to exercise these rights guaranteed by the public trust doctrine, the public must have access to municipally-owned dry sand areas as well as the foreshore").

99. See, e.g., Raleigh Ave. Beach Ass'n v. Atlantis Beach Club, Inc., 879 A.2d 112, 113 (N.J. 2005) ("[T]he public trust doctrine requires the Atlantis [upland sand beach] property to be open to the general public . . . .").

100. See, e.g., Borough of Neptune City v. Borough of Avon-by-the-Sea, 294 A.2d 47, 55 (N.J. 1972) (noting New Jersey "ha[s] readily extended the [public trust] doctrine . . . to cover other public uses, and especially recreational uses," and thus "while municipalities may validly charge reasonable fees for the use of their beaches, they may not discriminate in any respect between their residents and nonresidents"); see also *Hay*, 462 P.2d at 673 (holding property owners' "use and enjoyment of [their] dry-sand area" did not extend to fencing in parts of their beach property because doing so interfered with public's "easement for recreational purposes to go upon and enjoy the dry-sand area"). This right was somewhat limited in McDonald v. Halvorson, 780 P.2d 714 (Or. 1989). In that case, the court upheld the rule in *Hay*, but limited it solely to areas abutting the ocean where "their public use has been consistent with the doctrine of custom as explained in *Hay*." Id. at 724. As such, the court held the *Hay* rule inapplicable to the beach in question, because it did not abut the ocean and there was no showing of customary public use. Id.

Second, under the law of exactions, the government has the power to impose conditions on private development by landowners. Often the government imposes requirements relating to public access, including conditioning the receipt of building permits on a requirement that the landowner grant free access to part of the land or dedicate part of the land to a public purpose.[101] Although courts require that exaction conditions must be closely related to the specific governmental goal,[102] such inquiries affect only the issue of compensation, not the power of the government to impose conditions; the exclusionary and injunctive rights of the landowner are abrogated even if the exaction fails to meet this requirement, because the condition is then simply treated as a taking and the government is merely forced to compensate the owner.[103]

Third, as illustrated by the preceding proposition, the government can readily terminate the exclusionary autonomy of property owners when it exercises its Fifth Amendment powers in the area of regulatory takings and eminent domain.[104] If the underlying public policy goals fit within the broad definition of substantially advancing legitimate state interests,[105] a property owner will not receive any compensation for a tak-

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101. See, e.g., City of Annapolis v. Waterman, 745 A.2d 1000, 1011 (Md. 2000) (finding city's condition on appellee's subdivision request did not constitute dedication where condition required recreational area for use by development residents but not general public); Jenad, Inc. v. Vill. of Scarsdale, 218 N.E.2d 673, 676 (N.Y. 1966) (finding village planning commission requiring subdivider to pay fee in lieu of dedication of recreational land to be "a reasonable form of village planning for the general community good" rather than unconstitutional tax).

102. For example, in *Nollan v. California Coastal Commission*, the government demanded that the owners of beachfront property grant an easement of access over the land to the public. 483 U.S. 825, 828 (1987). However, the Court found that the imposed condition did not serve the government's asserted interest of making the public feel more comfortable with gaining access to the nearby public parks. Id. at 835–39. Thus, the regulation at hand in *Nollan* was considered a taking that required just compensation, rather than an exaction. Id. at 839, 841–42. In addition, in *Dolan v. City of Tigard*, a city government conditioned the granting of a permit to expand building facilities on the property owner dedicating a portion of her property for a public bike path and for a public greenway. 512 U.S. 374, 380 (1994). The Court went beyond *Nollan* to inquire as to whether the "'essential nexus'" existed between the "'legitimate state interest' and the permit condition." Id. at 386 (quoting *Nollan*, 483 U.S. at 837). The Court held that a use restriction is a taking if it is not "'reasonably necessary to the effectuation of a substantial government purpose.'" Id. at 388 (quoting *Nollan*, 483 U.S. at 834). Thus, the government "must make some sort of individualized determination that the required dedication [of land] is related both in nature and extent to the impact of the proposed development." Id. at 391.

103. U.S. Const. amend. V ("No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.").

104. Id.

105. Property owners' rights of exclusion are further narrowed in this context by the broad definition of the public use requirement of the Fifth Amendment by the U.S. Supreme Court. See, e.g., Kelo v. City of New London, 545 U.S. 469, 484–85 (2005) (finding general benefits accruing to community from economic growth via private

ing of his or her property unless the owner is denied all "'economically viable use'" of the property.[106] Here, as when a use of land is regulated in the exactions context, the most a landowner can hope for is to receive liability rule protection in the form of compensation as a substitute for traditional property rule protection in the form of the right to exclude.

D. *Property Law's Recognition of Public and Private Interests*

The preceding overview demonstrates that qualifications to the exclusionary rights of property owners are a prominent fixture in a variety of circumstances when there exists a compelling social interest in obtaining access to property. Despite our adherence to the fundamental principle of protecting private property, the examples above illustrate that our legal system adopts a relatively pragmatic approach to exclusionary rights of a private landowner, such that socially beneficial private and public interests in accessing the landowner's property can be realized. The doctrine of private necessity, for instance, applies to situations where exercising the right of exclusion would lead to outcomes that are highly unfavorable in terms of interpersonal benefits.[107] In circumstances involving private necessity, the value to an owner of denying entry is suspect, as it compares to the costs to the trespasser of being refused entry. Due to the potential harm to the trespasser, the costs of exclusion on behalf of the trespasser in need are far outweighed by the presumptive costs to the owner of not being able to deny access. In such circumstances, honoring an absolute right of exclusion would lead to outcomes that might be not only welfare-reducing, in terms of interpersonal utility comparison, but also inequitable to the point of undermining the legitimacy of the legal system.

The rules concerning easements, adverse possession, and estoppel all serve equally important goals. One of the main purposes of adverse possession, for instance, is that it "quiet[s] all titles which are openly and consistently asserted, to provide proof of meritorious titles, and correct errors in conveyancing."[108] Adverse possession also serves fairness purposes by "penaliz[ing] the negligent and dormant owner for sleeping

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redevelopment plans qualified such plans as permissible "public use" under Takings Clause of Fifth Amendment).

106. *Nollan*, 483 U.S. at 834 (quoting Agins v. Tiburon, 447 U.S. 255, 260 (1980)); see also Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 538 (2005) (reiterating government must pay just compensation when it regulates property in manner that deprives owner of all economically beneficial use of his land, unless background principles of nuisance and property law independently restrict owner's use of said property); Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015–19 (1992) (establishing categorical rule or "total takings" test by which government action is taking if it denies owner all economically valuable use of property).

107. See supra notes 44–47 and accompanying text (describing private necessity doctrine).

108. Henry W. Ballantine, Title by Adverse Possession, 32 Harv. L. Rev. 135, 135 (1918).

upon his rights."[109] By limiting property owners' exclusionary powers, the doctrine of adverse possession may also promote economic efficiency by protecting society's interest in encouraging careful contracting, reducing land title conflicts, rewarding productive uses of scarce resources, and protecting the reliance interests of good faith users of another's property.[110]

Similarly, the right of exclusion is abrogated under the laws of eminent domain and regulatory takings in order to enhance the state's capacity to perform essential regulatory duties in the public's interest.[111] Qualifications on the right to exclude that attach to publicly accessible private property serve important constitutional and societal goals of protecting fundamental American values, such as freedom from discrimination, equal protection, freedom of speech, and so forth.[112]

As this Essay argues, trespass incidents similarly involve a weighing of interests: The act of invading another person's property is justified only if done to protect or advance some private or public interest of a value greater than, or at least equal to, that of the interest invaded.[113] The individual and public goals merge in certain situations where a compelling case can be made for qualifications to the exclusion right because the actions of an individual trespasser have positive spillover effects on broader social goals. Take the typical situation of media trespass: Although, on its face, a typical trespass dispute simply pits the privacy interest of the private landowner against the journalistic and commercial goals of the investigative journalist, the ultimate balance of each party's right has an impact on broader society. Historically, investigative journalism has fulfilled an important role in uncovering activities that may or do create social costs by bringing issues of societal interest to the public's attention.[114] In this sense, investigative journalism often plays a significant role as a spotlight for further legal investigation and public enforcement of zoning violations, health code violations, political misdoings, corruption, and other similar issues. As the Essay illustrates below, media trespass provides an illustration of what can be gained from a better articulated balancing approach that weighs the autonomy and privacy of landowners against the social gains that result from certain infringements on the right of exclusion. Towards this purpose, this Essay presents a new test for trespass disputes, described in the next Part.

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109. Id.; see also Joseph William Singer, The Reliance Interest in Property, 40 Stan. L. Rev. 611, 665–70 (1988) (positing in part that people regard loss of asset in hand as more significant than forgoing opportunity to realize apparently equivalent gain).

110. Dukeminier et al., 7th ed., supra note 25, at 116–19 (presenting various arguments about motivations underlying adverse possession).

111. See supra notes 104–106 and accompanying text.

112. See supra notes 97–103 and accompanying text.

113. See infra notes 152–155 and accompanying text (arguing acts of trespass should receive more understanding if they serve purposes that are socially valuable).

114. See supra notes 6–9 and accompanying text (providing examples of investigative journalism).

III. A New Approach: A Four-Factor Test of Fair Trespass

This Essay develops a coherent and general doctrinal framework that balances private rights of landowners against the various competing social interests in access. The proposed framework compels courts to explicitly address the interests of society in access to private property and to evaluate the relative costs of the trespassory act imposed on a property owner. In doing so, the suggested framework provides the much needed predictability required to distinguish between trespassory acts which should be strongly discouraged ex ante from acts that should be excused based on broader societal interests.

Toward this end, this Essay proposes a novel four-factor test of "fair trespass" which draws upon the concept of fair use developed in copyright law. This Part first explores a number of analogies between trespass and copyright law and then provides background information on the application of fair use in copyright law. Finally, this Part sets out the various components of the proposed test.

A. *Property Trespass and Copyright Infringement: A Comparison*

The proposed "fair trespass" test is inspired by the judicially developed doctrine of fair use in copyright law.[115] In copyright law, courts may excuse infringement of the rights of copyright holders if they determine that the infringing behavior is nonetheless fair.[116]

While there are many important differences between the stated goals and doctrinal foundations of copyright law and the law of trespass,[117] both areas of law share significant common ground. First, copyright and trespass law operate on the basic premise that the right holder has an exclusive right of use and, concurrently, a strong right of exclusion that is protected by a right of injunction.[118] Second, in both fields of law, there

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115. See Folsom v. Marsh, 9 F. Cas. 342, 348–49 (Story, Circuit Justice, C.C.D. Mass. 1841) (No. 4901) (establishing affirmative defense of fair use as involving inquiry into "the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work").

116. See, e.g., Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 571–72 (1994) (holding parody of "Oh, Pretty Woman" may constitute fair use, which would provide complete defense to liability for copyright infringement).

117. The main distinction between exclusion in copyright law (and intellectual property law more generally) on the one hand, and property law on the other, is that the former involves nonphysical goods while the latter concerns physical goods. The nonrival nature of consumption of intellectual property goods has important implications with regard to policy issues—for instance, with regard to the provision and pricing of resources—that are well outside of the scope of this article. For a discussion, see Robert Cooter & Thomas Ulen, Law & Economics 124–40 (5th ed. 2008) (providing background on range of policy issues special to intellectual property law).

118. Copyright law specifically mandates the right to exclude others from copying an original work. See Copyright Act of 1976 § 106(1), 17 U.S.C. § 106(1) (2006) (granting owners exclusive rights to reproduce copyrighted works). For a background discussion of trespass law and exclusion, see supra Part I.

exists a delicate balance between the absolute protection of exclusive rights on the one hand, and a number of broader societal interests that figure in the background. In the same way that copyright law reflects a general goal to encourage the creation and dissemination of creative works, property law seeks to induce productive uses of scarce resources.[119] Similarly, in the background of copyright law operates a potential conflict between the exclusive rights of copyright holders on the one hand, and encouraging derivate works, commentary, and the protection of free speech on the other.[120] As illustrated in Part II above, qualifications to exclusion in property law involve a comparable potential for conflict between the exclusive right of property owners and other broad societal interests, such as free speech, public safety, and public access.[121]

To illustrate the analogy between the dilemma of access in copyright and trespass, compare the issue of parody in copyright law to that of media investigations in trespass law. Authors often object to the use of their works in parodies or satires if they believe that they (or the work) are cast in a critical or negative light.[122] Similarly, property owners do not want their property investigated if it might bring unfavorable information to the surface.[123] In both instances, an absolute right of exclusion might discourage some valuable instances of parody, criticism, and investigative journalism.

In copyright law, this conflict is mediated by the doctrine of fair use.[124] Under section 107 of the Copyright Act of 1976, the fair use of a copyrighted work, for purposes like criticism, comment, news reporting, teaching, scholarship, or research, is not an infringement of copyright.[125]

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119. See generally Epstein, supra note 21, at 742–44 (arguing common law property doctrine provided superior incentives for economic development than does modern constitutional property doctrine).

120. See generally Wendy J. Gordon & Robert G. Bone, Copyright, *in* 2 Encyclopedia of Law and Economics: Civil Law and Economics § 1610, at 189, 191–96 (Boudewijn Bouckaert & Gerrit De Geest eds., 2000) (summarizing benefits and costs of copyright law).

121. For a summary of the conflict between property rights and other interests, see supra Part II.D.

122. See Wendy J. Gordon, Fair Use as Market Failure: A Structural and Economic Analysis of the *Betamax* Case and Its Predecessors, 82 Colum. L. Rev. 1600, 1633 (1982) ("Even if money were offered, the owner of a play is unlikely to license a hostile review or a parody."); see also Harriette K. Dorsen, Satiric Appropriation and the Law of Libel, Trademark, and Copyright: Remedies Without Wrongs, 65 B.U. L. Rev. 923, 925 (1985) (noting "satirists criticize our society by directing their sharp barbs at well-known people, well-known commercial enterprises or trademarks, and popular literary figures or works" in a way that "often causes hurt feelings or embarrassment"); infra notes 129–131 and accompanying text (discussing Supreme Court's treatment of parodies in *Campbell v. Acuff-Rose Music, Inc.*).

123. See infra notes 161–180 and accompanying text (discussing decisions in *Desnick* and *Food Lion* as recent examples of this trend).

124. See Folsom v. Marsh, 9 F. Cas. 342, 348–49 (Story, Circuit Justice, C.C.D. Mass. 1841) (No. 4901) (introducing test for copyright infringement based on "justifiable use").

125. 17 U.S.C. § 107 (2006).

Fair use is recognized as an essential instrument that allows courts to strike a balance between the exclusive rights of an owner's veto power on unlicensed uses of copyrighted works and the freedom of the public to engage in derivate works, criticism, and commentary. Such exemption from the exclusive rights of copyright owners is deemed necessary because certain uses of copyrighted works would otherwise never materialize, simply because owners of the underlying work would not grant permission.[126] In order to protect socially beneficial uses of copyrighted material without discouraging authors, courts have interpreted the Copyright Act to require application of a four-part test to determine whether unlicensed uses of copyrighted works are fair, and hence excused from copyright infringement.[127] Under the statutory definition, fair use is to be determined by examining (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for the copyrighted work.[128]

Fair use is considered particularly appropriate when the owner's reluctance to license use of his work is motivated by a desire to restrict the flow of information. Take, for instance, the famous example of *Campbell v. Acuff-Rose Music, Inc.*, where a group of rap musicians, known as 2 Live Crew, requested a license from music publisher Acuff-Rose for the use of basic musical elements and the chorus of Roy Orbison's song, "Oh, Pretty Woman."[129] Acuff-Rose refused the license, yet 2 Live Crew released the album nonetheless, giving Orbison full credit rights as the original writer of the song.[130] In his classic analysis, Justice Souter, writing for the majority, held that because no derivative market for parodies exists, many creative, critical derivative works would never see the light of day if prior authorization were required.[131] It is unlikely that an author would ever sell parody rights—even at high prices—because authors are wary that their

126. Gordon, supra note 122, at 1632 (describing fair use doctrine in cases where owners "might be reluctant to license," and noting courts have "tended to grant fair use treatment where copyright owners seemed to be using their property right not for economic gain but to control the flow of information").

127. See 17 U.S.C. § 107 (presenting fair use limitations on owners' exclusive copyright rights). The predecessor of this test was articulated in *Folsom*, 9 F. Cas. at 348 (establishing affirmative defense of fair use as inquiry into "the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work").

128. 17 U.S.C. § 107.

129. 510 U.S. 569, 572–73 (1994).

130. Id. at 573.

131. See id. at 592 ("'People ask . . . for criticism, but they only want praise.'" (quoting W. Somerset Maugham, Of Human Bondage 241 (Penguin Books 1992) (1915))).

works will become the target of critique and ridicule.[132] Thus, courts have reasoned that unless they lean towards a lenient presumption of fair use, it will be highly unlikely that the public would be able to enjoy the benefits of parody.[133] Generally, most parodies are eligible for a fair use exemption because society wants to encourage valuable uses even if the rights holder objects to such use.[134]

A similar logic applies to media reporters seeking to criticize the behavior of property owners. Property owners are not likely to give reporters permission to enter the premises when socially untoward practices are being conducted on their property. Yet investigative journalism is a socially valuable activity.[135] It is in the interest of the public to learn about the kinds of hazardous, fraudulent, or unsanitary practices that media reports can uncover, because once these reports are released, the information has substantial positive externalities. Due to the natural flow of information, it is impossible to restrict access to the information's immediate subscribers and thus the value of the news reporting is shared widely. Media reporters rarely capture the full value of these externalities when being compensated for their investigative work—monetarily or otherwise—which might result in a dearth of this kind of socially productive behavior.[136] If the legal system fails to achieve the right balance between the autonomy of landowners and the right of access for journalists, the subsequent liability risks might further discourage investigative news reporting and research, thereby depriving the public of important informa-

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132. See id. (noting "the unlikelihood that creators of imaginative works will license critical reviews or lampoons of their own productions"); see also supra note 122 (describing authors' reluctance to license works for parody or critique purposes).

133. See 4 Melville B. Nimmer & David Nimmer, Nimmer on Copyright § 13.05[C][1], at 13-224.1 to -225 (2010) (arguing that only through recognition of fair use defense "is society likely to reap the benefit of" parodies of literary works).

134. See Robert P. Merges, Are You Making Fun of Me?: Notes on Market Failure and the Parody Defense in Copyright, 21 AIPLA Q.J. 305, 310 (1993) (noting in parody cases, "the refusal to license is based on a noneconomic motive," but "copyright law's preference for dissemination is too strong to give any credence to such motives"). One notable exception, where a parody was not considered fair use, was *Walt Disney Productions v. Air Pirates*, in which the defendant company copied Disney cartoon characters for adult "counter-culture" comic books and this copying was held to exceed permissible levels. 581 F.2d 751, 758–59 (9th Cir. 1978).

135. Of course, not all actions by investigative journalists produce socially valuable information. Similarly, not all attempts at parody are equally successful. Just as courts evaluate the nature of a parody in a fair use analysis, courts would consider the value of an act of trespass in the test proposed in the next Part.

136. While a journalist might derive some rewards from uncovering socially harmful activities (salary, raises, bonuses, esteem, perhaps even a Pulitzer award), journalists hardly ever capture the full value of the activity to society (total damage prevented, lives saved). Generally, when actors fail to capture the full value of their activities, there is a risk that the activity will be underproduced. See generally Steven S. Shavell, The Social Versus the Private Incentive to Bring Suit in a Costly Legal System, 11 J. Legal Stud. 333 (1982) (discussing difficulty in production of particular activity at socially optimal level because of divergence between "the social and the private benefits" resulting from said activity).

tion. As Part IV discusses in more detail, a fair trespass doctrine in property law is useful because a strict application of trespass rules renders valuable newsgathering efforts, free speech, and other social policy goals more difficult.

B. *The Fair Use Test in Copyright Law*

Originating in a number of judicial decisions beginning in 1841,[137] Congress codified the doctrine of fair use in the Copyright Act of 1976.[138] The traditional test used to determine if a work is a fair use consists of four elements, to be flexibly balanced by the court based on the case before it. The four relevant factors include the purpose and character of the use, the nature of the copyrighted work, the amount of the copyrighted work used, and the effect of the use on the potential market or value of the copyrighted work.[139]

The first factor—the inquiry into the purpose and character of the use of the copyrighted material—focuses mainly on the extent to which the new work is "transformative."[140] In the journalism context, the Supreme Court has held that news reporting was not fair use where the defendant "went beyond simply reporting uncopyrightable information and actively sought to exploit the headline value of its infringement."[141] The Court thus focused more on the commercial nature of the use rather than the extent to which the new work was transformative.

The second factor of analysis—the nature of the copyrighted work—typically involves an inquiry into whether the underlying work is fictional

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137. As mentioned above, Justice Story essentially created the predecessor to contemporary fair use doctrine in a case involving the copying of private letters that belonged to George Washington. See Folsom v. Marsh, 9 F. Cas. 342, 348–49 (Story, Circuit Justice, C.C.D. Mass. 1841) (No. 4901) (establishing affirmative defense of fair use as involving inquiry into "the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work"). The court ultimately concluded that substantial parts of Washington's letters could not be copied without permission. Id. at 349. Scholars now cite this case for having "provided the foundation for one of copyright law's most important safety valves for promoting cumulative creativity and free expression." Robert P. Merges et al., Intellectual Property in the New Technological Age 506 (4th ed. 2006).

138. 17 U.S.C. § 107 (2006).

139. Id.

140. Justice Souter emphasized in *Campbell v. Acuff-Rose Music, Inc.* that "the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use." 510 U.S. 569, 579 (1994). He noted, however, that "such transformative use is not absolutely necessary for a finding of fair use." Id.

141. Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 561 (1985).

versus factual,[142] published versus unpublished,[143] or creative versus informational.[144] In his opinion in *Campbell*, Justice Souter explained that analysis of the second factor must recognize that "some works are closer to the core of intended copyright protection than others, with the consequence that fair use is more difficult to establish when the former works are copied."[145]

The third factor considers the amount and substantiality of the infringement. The analysis focuses on "whether '[t]he extent of . . . copying' is consistent with or more than necessary to further 'the purpose and character of the use.'"[146] The analysis consists of two parts[147]: first, a quantitative analysis, comparing the percentage of the material taken from the underlying work to the length of the work as a whole,[148] and second, a qualitative analysis, examining whether the infringer copied the "heart" of the underlying work.[149]

The fourth factor of analysis, the effect of the infringement on the potential market or value of the copyrighted work, is "undoubtedly the single most important element of fair use."[150] The Supreme Court has clarified the application of the fourth factor, noting that the appropriate assessment is "not whether the secondary use suppresses or even destroys the market for the original work or its potential derivatives, but whether the secondary use usurps or substitutes for the market of the original work."[151]

C. *A Standard of Fair Trespass*

Under my proposal, courts should examine trespass on the basis of four factors adopted from fair use. First, courts should examine the pur-

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142. See, e.g., Castle Rock Entm't, Inc. v. Carol Publ'g Grp. Inc., 150 F.3d 132, 143 (2d Cir. 1998) ("[T]he scope of fair use is somewhat narrower with respect to fictional works . . . than to factual works.").

143. *Harper & Row*, 471 U.S. at 553 ("Congress intended the unpublished nature of the work to figure prominently in fair use analysis.").

144. See New Era Publ'ns Int'l v. Carol Publ'g Grp., 904 F.2d 152, 157–58 (2d Cir. 1990) (echoing distinction between factual and fictional in distinction between "'primarily informational rather than creative'" (quoting Consumers Union of U.S., Inc. v. Gen. Signal Corp., 724 F.2d 1044, 1049 (2d Cir. 1983))).

145. *Campbell*, 510 U.S. at 586.

146. *Castle Rock*, 150 F.3d at 144 (quoting *Campbell*, 510 U.S. at 586–87).

147. See *New Era Publ'ns*, 904 F.2d at 158 (noting third factor "has both a quantitative and qualitative component").

148. Id.

149. *Campbell*, 510 U.S. at 588. As the Court pointed out in *Campbell*, the third inquiry in the fair use analysis necessarily depends on the first factor and must be decided in context. Id. at 586. For example, if two different defendants in separate cases were both found to have taken the "heart" of an underlying work, the third prong could still weigh in favor of either infringement or fair use, depending on whether the work was a biography or a parody, as "the heart is also what most readily conjures up the [work] for parody." Id. at 588.

150. Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 566 (1985).

151. *Castle Rock*, 150 F.3d at 145.

pose and character of a trespasser's action, compelling courts to fully consider the purpose of the trespass and the potential social benefits involved, such as free speech, newsgathering, or public safety. Second, courts should consider the nature of the private property that is subject to the trespass to determine if that space should receive more or less protection from trespassory entry. Third, courts should also consider the extent and substantiality of the trespassory action, including circumstantial factors relating to the timing or duration of the trespass and the amount of land that has been trespassed upon. Fourth, courts should determine the effect of the trespass upon the property interest in the land. This final factor relates not to the indirect consequences of the trespassory action, such as the distribution of information obtained as a result of the trespass, but rather to the impact that the physical act of trespass has on the quiet use and enjoyment of the property by its owner. These factors should be considered in this particular sequence, with the first factor acting as a threshold for the court to examine the other three. Specifically, if a court concludes that no social benefits accrue from a trespassory action (on the first factor), no further investigation is needed and the trespass should not be excused. By contrast, if a court concludes that substantial benefits are involved in the trespass, the court should then consider how much social benefit is derived and engage in a cumulative analysis of all four factors, such that weakness in one factor can be compensated by strengths of defense on another issue.[152] The sections that follow briefly clarify each of these factors, and Part IV applies the test to a few examples.

1. *First Factor: Purpose and Character of the Trespass.* — The first factor considers the purpose and character of the trespassory action and is inspired by the first factor of fair use analysis, in which courts examine whether the use of copyright protected material adds value to the infringed work.[153] For example, unauthorized copying from an original work might be excused if the parodist transforms the author's original work by holding it up to ridicule.[154]

The analogy to trespass to land is straightforward. Acts of unauthorized entry should receive more understanding if they serve purposes that are socially valuable. For instance, if an individual is seeking to obtain important information relating to major public health hazards, the purpose and character of the act of trespass should be weighed as more favorable than if the exclusive purpose of entry is to obtain some private benefit. More generally, the first factor takes into account situations where there are potential positive spillover effects for society, such as with

152. See infra Part IV.A (balancing four fair trespass factors in context of two media trespass cases).

153. See supra notes 140–141 and accompanying text (detailing fair use doctrine's first factor assessing "transformative" use of copyrighted material).

154. See supra Part III.A (comparing parody in copyright law to media investigations in trespass law).

investigative journalism that seeks to uncover health hazards. Further, the character of the trespass is an important factor in establishing the protection afforded. Relevant considerations include, for instance, whether the trespasser was seeking to avoid serious harm in an emergency situation, whether an attempt to obtain permission had been made or was realistic under the circumstances, and whether alternatives to unauthorized entry were available.

The analysis of the purpose and character of the trespass seeks to enable socially valuable conduct that might be deterred without sufficient protection. This is particularly likely whenever the private benefits of entry are lower than the social benefits obtained. For instance, a trespassory action by a nonprofit organization that seeks to provide health and labor rights information to workers deserves more protection than entry of a commercial business on the premises of a competing company to obtain commercially valuable information.[155] In the former case, the trespasser is less likely to capture the full social benefits of his or her actions. The general point is that not all trespassory actions are equal, and trespassory actions with purposes beyond the mere private interest of the trespasser should be considered explicitly.

2. *Second Factor: Nature of the Protected Property.* — In the second factor of the analysis, courts should consider the nature of the property that is subject to trespass intrusions. The scope of a fair trespass justification should be relatively narrow if a property is purely residential, whereas publicly accessible property (like private malls, common areas of condominiums, or business grounds) should receive less protection. Such a distinction is justified because purely residential property gives owners stronger expectations of the right to control access to the property and autonomy with regard to the personal use and exclusive enjoyment of the property.[156] Such expectations are less pronounced for property that is generally accessible to the public, such as commercial businesses, restaurants, and similar establishments. This is not to suggest that a fair trespass defense is not available in the case of private, residential property: Because the suggested fair trespass analysis weighs each of the various factors against one another, even intrusions on residential property might be excused in circumstances where highly valuable interests motivated the intrusion. Overall, the second factor of the fair trespass test involves a consideration of the nature of the property along the wide spectrum of property uses ranging from strictly private (residential

155. Compare State v. Shack, 277 A.2d 369, 371–72, 375 (N.J. 1971) ("[T]he ownership of real property does not include the right to bar access to governmental services available to migrant workers and hence there was no trespass . . . ."), with Desnick v. Am. Broad. Cos., Inc., 44 F.3d 1345, 1352 (7th Cir. 1995) (noting "a competitor [who] gained entry to a business firm's premises posing as a customer but in fact hoping to steal the firm's trade secrets" would be subject to liability for trespass).

156. For a more in-depth analysis of heightened expectations of privacy in the residential context, see infra note 158 and accompanying text.

houses, apartments) to more public uses (private membership beach clubs, businesses open to the public, public parks).

3. *Third Factor: Amount and Substantiality of the Trespass.* — The third factor analyzes the degree of trespass based on objective factual observations concerning the extent of physical occupation and the duration of the trespass. Most obviously, the amount and substantiality of a trespass intrusion involves consideration of relatively straightforward factors such as the amount of land that was crossed and the amount of times that a trespassory act occurred. Timing may figure as a significant aspect of the amount and substantiality of any given act of trespass. Trespassory acts of a shorter duration are, all else being equal, less intrusive. Durable or recurrent intrusions, on the other hand, are more burdensome to the property owner, and seemingly permanent occupations of another's land, such as intentional encroachments in the adverse possession context, generally would not qualify as "fair" trespass.[157]

4. *Fourth Factor: Impact of the Trespass.* — Fourth, and finally, the proposed analysis calls for consideration of the subjective burdens that trespass intrusions impose upon landowners' property interests. The private costs of trespassory acts are to be evaluated along a few dimensions. First, there is the matter of the location of a trespass intrusion. Location is important because a landowner's expectations of autonomy and exclusivity are often different across a single property. For instance, intrusions in more intimate settings such as the inside of a residential home are more burdensome than intrusions on more undeveloped parts of a property.[158] Second, the burden of intrusion will also depend on how the trespass affects the owner's quiet use and enjoyment of the property. Essential in this regard is the manner in which the intrusion disturbs the specific land use by the owner. If a neighbor makes unauthorized use of a passageway of access, this will presumably be more disruptive to the landowner if the path of access is close to the residential home of the owner, disturbs the night rest of the owner, endangers the safety of the landowner's children, or similarly infringes upon a landowner's quiet use and enjoyment of the property.

Importantly, the subjective private harm, as it relates to the property interest, should be distinguished from other interests of the landowner. For instance, in the context of media trespass, the total harm occasioned

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157. See supra Part II.A (describing various property doctrines preserving owner's right of exclusion against long-term trespassers, but only for statutorily determined period after which trespasser could obtain title or license to property in its entirety or particular route or use of part of property, respectively).

158. This common intuition is reflected in privacy law where greater protection is afforded inside the home. See, e.g., United States v. Karo, 468 U.S. 705, 713–15 (1984) (finding electronic surveillance of object in private residence, not open to visual surveillance, was violation of defendant's expectation of privacy, while electronic surveillance of similar object, located just outside private residence, was not); see also Kyllo v. United States, 533 U.S. 27, 31–33 (2001) (noting reasonable expectations to privacy are most heightened in areas including and adjacent to a private home).

by reporters on business enterprises may be quite dramatic. When investigative journalism brings to light a socially harmful practice that occurs on a business property, the company may suffer substantial reputational damage and commercial setbacks. However, these negative repercussions stem from the disclosure of information, not from the act of trespass or the violation of the right to exclude. Ownership rights do not encompass an "absolute . . . right to suppress information from the public."[159] Rather, claims of action relating to the use or protection of information are the province of privacy law or tort laws relating to defamation, libel, and slander.[160] The balancing test proposed in this Essay is limited to trespass claims and the protection of a landowner's right to exclude strangers.

IV. Applications of the Fair Trespass Doctrine

A. *Media Trespass*

In order to engage in newsgathering activities, reporters must often gain access to information that others seek to hide. If socially valuable information can only be obtained through access to the private premises of the owner, a sharp conflict emerges between the rights of a property owner, on the one hand, and the public interest in obtaining such information, on the other. While property owners are entitled to protection against intrusion, society has a compelling interest in discovering dishonest or potentially harmful activities.

Consider the local student newspaper hypothetical described in the introduction. As previously stated, the journalistic intentions of the newspaper reporter will not redeem the newspaper since, as stated in *Desnick v. American Broadcasting Cos.*, "there is no journalists' privilege to trespass."[161] But such neglect of the value of access in this context is troubling for at least two reasons. First, investigative journalism often unveils information that is important to the public interest.[162] In the hypothetical, the local residents have a strong interest in learning about the restaurant conditions causing food poisoning. Second, because property owners often have nothing to gain (but a lot to lose) from such investigative journalism, reporters often have few options other than to resort to vari-

159. Parchomovsky & Stein, supra note 14, at 1856–57.

160. Generally speaking, defamation is the issuance of a false statement about another person, which causes that person to suffer harm. See Restatement (Second) of Torts §§ 558–559 (1977). Slander involves the making of defamatory statements by a transitory (nonfixed) representation, usually a verbal representation or a gesture. Id. § 568. Libel involves the making of defamatory statements in a printed or fixed medium, such as a magazine or newspaper. Id.; see also N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80, 283 (1964) (establishing "actual malice" standard requiring knowledge of statement's falsity or "reckless disregard" of whether statement was false).

161. 44 F.3d 1345, 1351 (7th Cir. 1995).

162. See supra notes 6–9 and accompanying text (describing details of these discoveries).

ous deceptive tactics to gain access to sensitive information. These deceptive tactics, such as applying for employment with a firm or pretending to be a patron, a client, or a patient, often result in trespass claims.[163]

Despite the broad social interest in access in these circumstances, courts continue to struggle with disputes involving unauthorized access obtained over the course of investigative activities. Consider the case of *Desnick*, where an eye clinic appealed the dismissal of its trespassory action against ABC.[164] Reporters working for ABC had obtained access to the eye clinic's facilities by posing as patients and had recorded footage that documented the clinic's fraudulent practices.[165] The ABC news report revealed, for instance, how the clinic convinced elderly Medicaid patients to undergo unnecessary surgical operations.[166] Judge Posner noted arguments in favor of the clinic on the basis of three legal axioms: First, "[t]o enter upon another's land without consent is a trespass";[167] second, "there is no journalists' privilege to trespass";[168] and third, "there can be no implied consent . . . when express consent is procured by a misrepresentation."[169] Nevertheless, Judge Posner affirmed the lower court's decision to dismiss the clinic's allegations of trespass, justifying the trespassory act by creating a distinction between the objection made by the landowner against the misrepresentation (not protected by property law) and the objection against the mere presence of the trespasser (as a protected property interest).[170] Accordingly, the objections by the clinic were not valid because there was "no invasion . . . of any of the specific interests that the tort of trespass seeks to protect," since "[t]he test patients entered offices that were open to anyone expressing a desire for ophthalmic services."[171] Posner acknowledged that this distinction was untidy, but decided that it was sufficient to do the work.[172]

In a similar case, *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, the Fourth Circuit upheld a nominal two dollar award for media trespasses perpetrated by ABC and its affiliates against the grocery chain.[173] News reporters applied for jobs with fake résumés and obtained employee positions, allowing them to uncover and videotape food contamination at the gro-

163. See supra notes 4–11 and accompanying text (discussing media trespass and how traditional trespass rules rarely allow for this type of behavior, despite societal interest in access).

164. 44 F.3d at 1347.

165. Id. at 1347–49.

166. Id.

167. Id. at 1351.

168. Id.

169. Id.

170. See id. at 1352 (noting that trespass only protects "the inviolability of the person's property").

171. Id.

172. Id. ("The lines are not bright—they are not even inevitable. They are the traces of the old forms of action, which have resulted in a multitude of artificial distinctions in modern law. But that is nothing new.").

173. 194 F.3d 505, 510–11 (4th Cir. 1999).

cery chain.[174] The Fourth Circuit decided that gaining entry to a firm's premises after securing a job with it through résumé misrepresentation did not constitute trespass but awarded a nominal fee for the lack of loyalty towards the employer.[175]

Both decisions are problematic. Given the categorical prohibition of media trespass, both cases create exceptions to this rule without clarifying the precise conditions that would favor a journalist taking investigative action involving unauthorized access. For instance, the decision in *Desnick* seems to condone entry by fraud if the act of entry does not extend beyond the normal conditions of access obtained by regular customers.[176] This does not inform circumstances such as those presented in *Food Lion*, where journalists obtained access to more secluded areas on the basis of their position as employees.[177] The decision in *Desnick* also seems to limit media trespass to acts in publicly accessible areas.[178] By contrast, in *Food Lion*, the court takes issue with the misrepresentation because it "exceeded" the obtained privilege of entry granted to the reporters.[179] At the same time, however, the nominal damage award effectively mitigates the deterrent effect of potential future actions in these circumstances.[180] In both cases, however, the public goals served by the trespass are not explicitly addressed.

The fair trespass test provides a superior framework to evaluate the boundaries of access and exclusion in the cases reported here. On the first factor—the purpose and character of the trespassory act—the investigative intentions of the trespass in *Desnick* and *Food Lion* weigh in favor of excusing the trespasser: The disclosure of the information obtained by the trespass here serves substantial public goals relating to health hazards in the marketplace. Moreover, the formal nature of these investigative intentions (conducted by an official reporter on a formal assignment) reflects positively on the character and intention of the act under the first factor. On the second factor—the nature of the private property that is subject to trespass—the nature of the property is a place of business in both cases, which implies a lower degree of protection. With regard to *Food Lion*, the overall assessment of this aspect of the property is slightly

174. Id. at 516–19.

175. Id. at 518.

176. *Desnick*, 44 F.3d at 1352–53.

177. *Food Lion*, 194 F.3d at 516–19.

178. *Desnick*, 44 F.3d at 1353.

179. *Food Lion*, 194 F.3d at 519 ("[C]onsent for them to be on its property was nullified when they tortiously breached their duty of loyalty . . . ."). In trespass disputes, the consent to enter can be canceled out "if a wrongful act is done in excess of and in abuse of authorized entry." Miller v. Brooks, 472 S.E.2d 350, 355 (N.C. Ct. App. 1996) (citing Blackwood v. Cates, 254 S.E.2d 7, 9 (N.C. 1979)); cf. Ravan v. Greenville Cnty., 434 S.E.2d 296, 306 (S.C. Ct. App. 1993) (noting trespass law protects "peaceable possession" of property).

180. The court awarded a total of two dollars on the duty of loyalty and trespass claims. *Food Lion*, 194 F.3d at 511, 524.

more complicated because it must also be taken into consideration that the journalists, acting as employees, entered parts of the premises that are not generally available to customers and the public. A landowner's expectations of exclusive use and enjoyment are necessarily higher in areas restricted to the public. The third factor—the extent and substantiality of the trespass—weighs more heavily against the journalists in *Food Lion* than in *Desnick*, again because the trespassers in the former case engaged in acts of trespass for several days posing as employees, whereas the trespassers in the latter case did not. On the basis of the fourth factor, the relative impacts of the trespassory acts in *Desnick* and *Food Lion* on the property interests of the owners seem minimal. The trespassory acts amounted to nothing more than visits by customers and work performed as regular employees, respectively. The unauthorized interference with the owner's quiet use and enjoyment of the property created by the journalists' actions (e.g., occasional note taking or recording with small cameras) was negligible to nonexistent. The more substantial impact of the trespassory act (or rather, of the information gleaned from the trespassory act) on the landowner in these cases, such as the reputation costs, do not involve any protectable *property* interest, and thus would not weigh heavily in the analysis of the fourth factor.[181] Finally, in both instances the acts of trespass were committed in the context of the trespassers misrepresenting their identity. Contrary to the categorical distinction suggested by the court in *Desnick*, however, a landowner does have the prerogative to differentiate between wanted and unwanted entrants.[182] This discretion falls well within the owner's prerogative as part of his or her property interest. Entry-by-fraud events undermine the autonomy of the property right holder to decide the conditions of entry on his property. Any decision in favor of media trespassers on the basis of entry-by-fraud would be better served by an analysis of the four factors proposed in this Essay than by the current ad hoc approach. The fair trespass analysis suggests a more coherent, unified framework that would provide a much clearer methodology for courts' decisions, while still reaching a similar outcome. Specifically, the evaluation of factors one and four suggest that the trespassory acts of the reporters should be excused due to (1) the countervailing benefits that result from the information obtained, and (2) the limited interference with the use and enjoyment and other property interests of the landowner.

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181. However, if the information obtained in media trespass is incorrect and harmful, this might constitute a potential tort (such as defamation or slander) that can be addressed elsewhere in the legal system. See supra note 160 and accompanying text (discussing possible tort causes of action in media trespass cases).

182. Parchomovsky & Stein provide the following analogy: "An atheist entering a church open to all prayers does not commit trespass. Yet he would commit trespass if he subsequently whispers blasphemy (even when no one else can hear it). What, if any, remedies would be available to the church in such a case is a separate question." Parchomovsky & Stein, supra note 14, at 1855 n.129.

B. *Private Necessity*

Cases of media trespass can serve as compelling illustrations of the need to consider the social policy interests relating to the nature and character of the trespassory act. A harder case for a novel doctrine of trespass involves a situation where the broad social interest in access seems absent. Indeed, many instances of trespass involve a more direct conflict between the individual interests of a landowner and those of a trespasser. However, as this Part demonstrates, a test of fair trespass also adds value to the analysis of this category of disputes.

Trespass doctrine currently recognizes only one type of interest in access: protection. Interference with private property is justified only in situations where a nonowner needs to protect him or herself, his or her property, or the life or property of a third person. The doctrine of private necessity grants a privilege to enter or remain on land in the possession of another "if it is or reasonably appears to be necessary to prevent serious harm to . . . the actor, or his land or chattels."[183] This privilege to enter out of necessity "'must be exercised at a reasonable time and in a reasonable manner' and in light of all the circumstances."[184] Courts are most favorable to the doctrine of private necessity when the necessity originates from an emergency of some sort.[185]

Case law suggests, however, that "inevitable necessity" is highly context dependent and difficult to evaluate. In *Berns v. Doan*, for instance, the court held that a fallen tree obstructing the road did not create an "inevitable necessity" sufficient to justify the motorist entering the landowner's driveway (where an accident with the landowner occurred).[186]

183. Restatement (Second) of Torts § 197 (1965).

184. Benamon v. Soo Line R.R. Co., 689 N.E.2d 366, 370 (Ill. App. Ct. 1997) (quoting Restatement (Second) of Torts § 197 cmt. a).

185. See, e.g., id. (finding trespasser's entry would have been reasonable because "his entry . . . was for his self-protection and to avoid the threat of bodily harm posed by the gang of boys chasing him," but manner of trespass, hiding near railroad tracks, was unreasonable); West v. Faurbo, 384 N.E.2d 457, 458 (Ill. App. Ct. 1978) (finding no liability for trespass when individual on bicycle swerved onto defendant's land, striking concrete block lining driveway, in attempt to avoid motor vehicle accident); Proctor v. Adams, 113 Mass. 376, 377–78 (1873) (finding no third party liability for trespass where third party entered onto private beach for purpose of salvaging boat cast onto shore by storm to return it to rightful owner before it was carried back out to sea); Ploof v. Putnam, 71 A. 188, 188–90 (Vt. 1908) (finding no liability where plaintiff moored sailboat to defendant's private dock without permission in storm and holding defendant liable for damage to plaintiff's family and boat when defendant compelled plaintiff to unmoor vessel). Emergencies also may induce privileges of entry on behalf of public bodies as well as private individuals. See, e.g., Am. Sheet & Tin Plate Co. v. Pittsburgh & L.E.R. Co., 143 F. 789, 790–91, 793 (3d Cir. 1906) (recognizing that in case of fire emergency, "exigencies of public safety and private necessity" subordinated railroad company's exclusive control over their tracks and justified entry by both private firefighters and agents of American Sheet to same extent as factory owner).

186. 961 A.2d 506, 511 (Del. 2008). But see, e.g., Campbell v. Race, 61 Mass. (7 Cush.) 408, 411 (1851) ("If a traveller in a highway, by unexpected and unforeseen occurrences, such as a sudden flood, heavy drifts of snow, or the falling of a tree, is shut

The court recognized the motorist had the ability to exercise a three-point turn and travel an alternate, though more circuitous, route in order to avoid the trespass.[187] Similarly, in *Benamon v. Soo Line Railroad Co.*, where a passing freight train partially amputated the foot of a boy who had hidden in a trainyard to "get away" from a local gang, the court reasoned that, even if the plaintiff's belief in the threat of bodily harm was reasonable, the action taken to avoid that threat was unreasonable, because there were other, safer options available to him.[188] In *Lange v. Fisher Real Estate Development Corp.*, a taxicab driver brought an action to recover for injuries sustained after he pursued a nonpaying passenger, at night, onto property under construction.[189] The primary issue was whether Lange, the driver, was a trespasser or licensee, his status affecting whether he fell within the private necessity exception to trespassing.[190] The court held that the private necessity privilege did not apply, as the plaintiff was in no way threatened by his passenger (who only ran off without paying the six dollar fare).[191] These cases illustrate the diverse circumstances under which trespassers assert the defense of private necessity and the relative conservatism courts have used in applying the doctrine.

More problematic, however, is the open-ended nature of the assessment of the behavior of the trespasser: In determining necessity, courts apply the concept of reasonableness to determine whether an uninvited individual has responded appropriately to exigent circumstances.[192] The criterion of the reasonable man is, of course, notoriously hard to pin down, especially when applied to situations involving personal emergencies.[193] Moreover, prior applications of the concept provide little in the way of reliable precedent because (1) courts rarely elaborate on the general conditions that fulfill the concept in an emergency; and (2) most

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out from the travelled paths, so that he cannot reach his destination, without passing upon adjacent lands, he is certainly under a necessity so to do.").

187. *Berns*, 961 A.2d at 511–12.

188. 689 N.E.2d at 369–70.

189. 832 N.E.2d 274, 275–76 (Ill. App. Ct. 2005).

190. Id. at 277.

191. Id. at 279.

192. See, e.g., *Benamon*, 689 N.E.2d at 370 (finding trespasser's entry would have been reasonable because "his entry . . . was for his self-protection and to avoid the threat of bodily harm posed by the gang of boys chasing him," but that manner of trespass, hiding near railroad tracks, was unreasonable).

193. Compare West v. Faurbo, 384 N.E.2d 457, 459 (Ill. App. Ct. 1978) (finding private necessity from personal emergency where thirteen year-old boy riding his bicycle swerved onto defendant's property to avoid oncoming automobile), with *Lange*, 832 N.E.2d at 279 (finding no private necessity where taxi driver chased nonpaying passenger onto construction site), *Benamon*, 689 N.E.2d at 370 (finding no private necessity for boy who hid in trainyard to escape local gang because choice of hiding spot was unreasonably hazardous), and Kavanaugh v. Midwest Club, Inc., 517 N.E.2d 656, 661 (Ill. App. Ct. 1987) (finding no privilege to trespass where driver left roadway due to apparent involuntary epileptic seizure).

relevant facts to establish necessity are highly context dependent and not necessarily applicable to other emergencies. Most fundamentally, by focusing solely on the reasonableness of the actions of the trespasser, many other relevant considerations remain neglected.

The four-factor test of fair trespass offers an alternative to the current approach. First, situations involving some type of emergency or where a trespasser is seeking to avoid serious harm to himself or herself or his or her possessions reflect positively on the nature and character of the trespass, the first factor in the fair trespass analysis. Courts should then move beyond this observation and assess the losses imposed by the exigent circumstances and the degree to which these costs were avoided by the trespass intrusion. In doing so, the first factor analysis enables us to distinguish between intrusions involving a trespasser who seeks to avoid the incurrence of personal losses as a result of unforeseeable adverse events, and intrusions where an individual is merely seeking to obtain profits by trespassing. When examining the nature and character of the trespass, it is crucial to determine whether the trespasser had any opportunity to negotiate ex ante with the landowner and obtain permission. If the adverse events were unforeseeable, the trespasser would not have been able to negotiate terms of access. Thus the expected losses to the trespasser, as compared to those of the landowner, become the decisive factor. If, on the contrary, the trespasser had the opportunity to request permission but failed to do so, permitting unauthorized access would seriously undermine the autonomy of the landowner. Finally, if the trespasser did attempt to obtain permission but was unsuccessful, as was the case in *Jacque v. Steenberg Homes, Inc.*,[194] the nature and degree of relative costs again become decisive.

The second step in the assessment concerns the nature of the private property upon which the trespass occurs. Again, if the character of the property is residential, this implies a higher degree of protection, though the notion of private necessity implies that this will be heavily countered by a weighty first factor.

The third factor involves consideration of circumstantial factors relating to the timing or duration of the trespass, as well as the amount of land trespassed upon. In considering this factor, necessity cases will be more likely to be evaluated favorably when, for example, a trespasser briefly enters someone's land to avert a traffic accident than when a trespasser spends several weeks on another's land.

Fourth, courts should determine the effect of the intrusion upon the property interests of the landowner. This final factor looks to the impact of the physical act of trespass on the owner's quiet use and enjoyment of the property, such as the disruption and costs the intrusion imposes upon

194. 563 N.W.2d 154, 156–57, 166 (Wis. 1997) (holding $100,000 in punitive damages not excessive where defendant intentionally trespassed onto neighbor's land after neighbor refused access for transport purposes).

the owner. Crucial factors for consideration may include: the location of the trespass (for example, at the border of the property versus near the residence); the interference with the activities of the landowner (for example, loss of nighttime rest); the intrusion's duration (one time passage, overnight stay, or repeated incursions); and the potential costs due to the manner in which access is obtained (jumping versus breaking enclosures, on foot versus via vehicle, alone versus accompanied by others).

Note that this four-factor analysis of necessity differs meaningfully from the current approach. The outcome does not depend primarily on the difficult determination of subjective reasonableness in a time of emergency. Rather, the test more directly takes into account the potential losses that the intruder avoids, as well as the intruder's potential to avoid those losses without unauthorized access, and it balances these factors against the costs that the intrusion imposes on the landowner to determine whether the trespass should be excused. While it may sometimes be difficult to impose objective values on each of these elements, the outcome is more likely to generate equitable results than the current focus on the reasonableness of the actions of the intruder. A comprehensive balancing exercise will allow parties to more easily identify ex ante situations where the benefits to the trespasser outweigh the costs imposed on the landowner.

V. POTENTIAL CRITICISM

This Part responds to some likely criticisms and addresses a few weaknesses of the proposed doctrine of fair trespass.

A. *Standards and Uncertainty*

One potential argument against introducing a fair trespass analysis is that it will also import the more problematic aspects associated with the concept of fair use in copyright law. Since its inception in the area of copyright, scholars have criticized the application of the doctrine of fair use[195] as being "notoriously difficult to predict,"[196] often pointing to the doctrine as a cause of "significant ex ante uncertainty"[197] in copyright law. The alleged unpredictability is caused in part by the number of fac-

195. The doctrine of fair use has been under attack for at least seventy years. See Dellar v. Samuel Goldwyn, Inc., 104 F.2d 661, 662 (2d Cir. 1939) (per curiam) (referring to fair use doctrine as "the most troublesome in the whole law of copyright").

196. Joseph P. Liu, Two-Factor Fair Use?, 31 Colum. J.L. & Arts 571, 574, 577–80 (2008) (proposing to reform current fair use doctrine by limiting analysis to only first and last of four factors, instead of replacing analysis altogether as some scholars have recommended).

197. Michael W. Carroll, Fixing Fair Use, 85 N.C. L. Rev 1087, 1095 (2007); see also 2 Paul Goldstein, Goldstein on Copyright § 12.1, at 12:3 (3d ed. 2005) ("No copyright doctrine is less determinate than fair use."); Darren Hudson Hick, Mystery and Misdirection: Some Problems of Fair Use and Users' Rights, 56 J. Copyright Soc'y U.S.A. 485, 497 (2009) ("[T]he fair use doctrine provides us with very little direction in making legal or ethical decisions."); Gideon Parchomovsky & Kevin A. Goldman, Fair Use Harbors,

tors that can influence an outcome,[198] the lack of guidance as to how the factors should be weighed or balanced by judges,[199] and the varying effect of policy concerns on the different factors.[200] Although it is almost universally recognized that a fair use defense is necessary in order to preserve the public domain,[201] scholars observe that it is rarely possible for users to achieve ex ante clarity through declaratory judgments.[202] The criticisms surrounding the doctrine have recently "grown louder and more insistent."[203]

Although negative experiences with the fair use test in copyright law might challenge the wisdom of adapting a similar test to trespass law, there are good reasons to believe that much of the criticism of the fair use analysis is either (1) overstated[204] or (2) not immediately relevant to a fair trespass analysis in property law. As to the first, when analyzing

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93 Va. L. Rev. 1483, 1491 (2007) ("[T]he vagueness of the fair use doctrine undermines its utility, upsets copyright's balance, and leads to the underuse of protected expression.").

198. Liu, supra note 196, at 574 ("Fair use is a classic example of a multi-factor test. The outcomes of multi-factor tests are notoriously difficult to predict. In part, this results from the sheer number of factors that can influence the determination.").

199. Pierre N. Leval, Commentaries, Toward a Fair Use Standard, 103 Harv. L. Rev. 1105, 1106–07 (1990) ("Judges do not share a consensus on the meaning of fair use."). Leval himself admits:

> Earlier decisions provide little basis for predicting later ones. Reversals and divided courts are commonplace. The opinions reflect widely differing notions of the meaning of fair use. Decisions are not governed by consistent principles, but seem rather to result from intuitive reactions to individual fact patterns. Justification is sought in notions of fairness, often more responsive to the concerns of private property than to the objectives of copyright.

Id. (footnotes omitted).

200. Liu, supra note 196, at 577–78 ("[T]he multi-factor test . . . requires courts to consider factors that may not be relevant to, or may at times obscure from courts, the ultimate policy concerns underlying fair use more generally.").

201. See id. at 573 (noting "chilling effect" of uncertainty in fair use defense on "ability of individuals to rely upon fair use when incorporating existing works into new ones"); Matthew Sag, God in the Machine: A New Structural Analysis of Copyright's Fair Use Doctrine, 11 Mich. Telecomm. & Tech. L. Rev. 381, 382 (2005) ("The central dilemma for fair use jurisprudence is that without the flexibility of fair use, copyright would become unwieldy and oppressive . . . .").

202. See Parchomovsky & Goldman, supra note 197, at 1510–18 (proposing that implementation of nonexclusive safe harbors, which expressly set forth minimum amounts of copying as fair, would work to eliminate uncertainty and unpredictability of current fair use doctrine in copyright law); see also Hick, supra note 197, at 497 ("[S]ince the doctrine, as written, is open to such wide interpretation, the outcome of any legal battle that turns on the doctrine will almost always be in doubt.").

203. Liu, supra note 196, at 571; see also, Carroll, supra note 197, at 1093 ("Concerns about the problem of fair use uncertainty have intensified recently . . . .").

204. See Barton Beebe, An Empirical Study of U.S. Copyright Fair Use Opinions, 1978–2005, 156 U. Pa. L. Rev. 549, 554 (2008) ("[M]uch of our conventional wisdom about [U.S.] fair use case law, deduced as it has been from the leading cases, is wrong."); see also Pamela Samuelson, Unbundling Fair Uses, 77 Fordham L. Rev. 2537, 2541 (2009) ("[F]air use law is both more coherent and more predictable than many commentators have perceived once one recognizes that fair use cases tend to fall into common patterns . . . .").

putative fair uses in light of prior cases involving similar underlying policy concerns, it is generally possible to predict whether a use is likely to be fair or unfair.[205] As to the second, much of the criticism of the fair use doctrine is due to the fact that an open-ended balancing analysis disadvantages risk-averse content users who lack the deep pockets necessary to shoulder the prospective litigation costs involved with a fair use defense.[206] Because the ability to carry the litigation costs is likely to be spread more evenly in trespass disputes, distributional concerns are likely to be less prevalent in this context.[207] Third, and most crucial, the overall degree of uncertainty will likely be modest in many instances involving trespass intrusions. In copyright law, the creation of novel technologies significantly complicates the resolution of fair use cases.[208] The very nature of the copyright action depends on the difficult question of whether a new technology can be considered making a copy of the authored material, and the lack of similarity between existing and new technologies often makes it difficult to rely on prior fair use decisions.[209] By contrast, trespass incidents are more likely to happen under circumstances that fall into recurring patterns. Although novel technologies used to acquire in-

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205. Samuelson, supra note 204, at 2542.

206. Specifically, the argument is that the unpredictability of the doctrine typically induces risk-averse users of copyrighted content to obtain potentially superfluous licenses from content owners in order to minimize the risks associated with statutory damages in copyright law. See James Gibson, Risk Aversion and Rights Accretion in Intellectual Property Law, 116 Yale L.J. 882, 884 (2007) ("Combine . . . doctrinal gray areas and severe consequences with the risk aversion that pervades key copyright industries, and the result is a practice of securing copyright licenses even when none is needed. Better safe than sued."). On the distributive consequences of new technologies, see generally Molly Shaffer Van Houweling, Distributive Values in Copyright, 83 Tex. L. Rev. 1535 (2005). Van Houweling states:

> [I]nexpensive technology for creativity and distribution empowers some creators who do not stand to benefit monetarily from copyright because their work does not have commercial appeal or because they do not want to exploit it commercially. The primary mechanism by which copyright aspires to encourage creativity (protecting creators from copiers who would drive down the market price for copies of their work) does not benefit these nonmarketplace creators. They are not monetarily benefited by copyright, but they are now burdened because technology gives them power to practice iterative creativity on a scale that is likely to come to the attention of copyright holders.

Id. at 1564.

207. Although landownership suggests a certain level of wealth, the incidental nature of many trespass intrusions brings about random distribution with regard to the wealth of the opposing parties in trespass disputes. Moreover, some deliberate acts of land intrusion, such as media trespass, pit wealthy plaintiffs (news corporations) against well-endowed defendants (for-profit hospitals, fast food chains, supermarket corporations, and similar entities). See supra Part IV.A (discussing *Desnick* and *Food Lion*).

208. See generally Ben Depoorter, Technology and Uncertainty: The Shaping Effect on Copyright Law, 157 U. Pa. L. Rev. 1831 (2009) (discussing unique impact of technology as source of uncertainty in copyright law).

209. See id. at 1846–48 (pointing to "the difficulty of perfectly predicting ex ante how the courts will apply the law to new circumstances ex post" in light of "technological advances that are often . . . erratic and . . . difficult to predict").

formation, such as wiretaps, present difficulties with regard to privacy concerns,[210] these new technologies are less likely to complicate questions regarding the physical invasion of property.[211] Therefore, prior decisions in fair trespass cases are more likely to generate a reliable set of precedents.

More generally, it must be acknowledged that flexibility generally comes at the expense of overall predictability. To some degree, open-ended standards necessarily impose higher degrees of ambiguity than bright-line rules.[212] When considering the desirability of flexible standards as opposed to strict rules, the fundamental empirical question is whether the benefits of flexibility outweigh the costs of the unavoidable higher degrees of uncertainty.[213] This Essay operates on the premise that flexible standards offer substantial benefits in copyright law, as well as in the proposed framework of a fair trespass doctrine.

B. *The Erosion of Property Rights and Individual Autonomy*

One might also object that the proposed doctrine fundamentally undermines the authority of landowners to exclude strangers from their property. This argument fails to appreciate the broader social and legal context of exclusionary rights in our legal system. The right of exclusion is not an absolute prerogative that can be freely exercised in all circumstances; our legal system frequently qualifies an owner's right to exclude in a variety of circumstances.[214] By reserving fair trespass exclusively for instances where significant public interests are at stake (factor one), the proposed framework does not upset the existing balance of rights in

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210. See, e.g., Marc Jonathan Blitz, Video Surveillance and the Constitution of Public Space: Fitting the Fourth Amendment to a World That Trades Image and Identity, 82 Tex. L. Rev. 1349, 1363 (2004) (arguing scope of Fourth Amendment protection "needs rethinking if constitutional privacy protections are to work well in twenty-first century conditions"); Raymond Shih Ray Ku, The Founder's Privacy: The Fourth Amendment and the Power of Technological Surveillance, 86 Minn. L. Rev. 1325, 1373–78 (2002) (arguing for application of Fourth Amendment constraints to searches conducted with new surveillance technologies unless new technology is specifically authorized by statute containing constitutionally adequate safeguards).

211. Please note that this is a comparative remark. The rate of innovation and the corresponding amount of new legal issues presented by new technologies is very likely higher in the context of copyright technologies. This is because innovations in the copyright arena frequently involve digital technologies (such as peer-to-peer platforms) that do not impose the larger, fixed costs of the physical production of machines or devices that are involved with physical trespassory acts.

212. Louis Kaplow, Rules Versus Standards: An Economics Analysis, 42 Duke L.J. 557, 571–77 (1992) (comparing respective costs and benefits of open standards and bright-line rules); see also Carroll, supra note 197, at 1100 ("It is well established that standards trade off greater ex ante certainty for greater ex post context sensitivity . . . .").

213. See Kaplow, supra note 212, at 561–62 ("One can think of the choice between rules and standards as involving the extent to which a given aspect of a legal command should be resolved in advance . . . .").

214. See supra Part II; see also Dukeminier et al., 6th ed., supra note 55, at 195 (noting balancing of public policies with restriction of property rights).

property law. By evaluating the nature of the space in which the intrusion occurs, the burdens imposed by the intrusion, and the negative impact on the property interest of the owner (factors two, three, and four),[215] the proposed doctrinal framework forces courts to safeguard the rights of landowners in appropriate circumstances.

Finally, it is important to note that the proposed doctrine will not necessarily be any more or less forgiving of trespass intruders. The last three factors—the nature of the protected property, the amount and substantiality of the trespass, and the impact on the owner's use and enjoyment of his or her property—will safeguard the interests of the property owner against most trespassory acts. The doctrine affects only trespasses where an act of intrusion generates a substantial socially desirable benefit and imposes relatively minor interference with a property owner's quiet use and enjoyment of his or her property. Moreover, examples such as *Desnick* and *Food Lion*, as discussed above, illustrate how courts effectively excuse trespass intrusions when broader goals are at stake.[216] On the basis of the analysis presented above, it seems reasonable that the courts in *Desnick* and *Food Lion* would similarly excuse both entry-by-fraud situations on the basis of the four-factor fair trespass test. Although the outcome might be similar, a fair trespass doctrine accomplishes this result while maintaining a coherent and more predictable framework that is capable of informing future decisions.

VI. CONCLUSION

Trespass law is commonly represented as a relatively straightforward doctrine that does not involve much complex analysis.[217] This Essay illustrates how trespass disputes often embody a fundamental conflict between the private right of exclusion and the socially valuable public and private interests that are sometimes served by permitting unauthorized instances of access to land. As this Essay argues, in looking beyond the interests of a private landowner, courts should more explicitly address the broad societal interests affected. A correct balance between private exclusion and public access seeks to promote these broad societal interests, while at the same time assuring the autonomy and privacy of landowners. Towards this end, this Essay develops a novel doctrinal framework to determine the limits of a property owner's right to exclude.

Adopting the judicially created doctrine of fair use from copyright law, this Essay introduces the concept of "fair trespass" to property law doctrine. When deciding trespass disputes, courts should carefully balance the following factors: (1) the nature and character of the trespass; (2) the nature of the protected property; (3) the amount and substantiality of the trespassory act; and (4) the impact on the owner's property

215. See supra Part III.

216. See supra Part IV.A.

217. Supra notes 1–3 and accompanying text.

interest. By substituting the existing patchwork of ad hoc situations where courts excuse trespassing, this proposal provides a more coherent and consistent framework that induces courts to directly address and more carefully balance the interests of private landowners against the broader societal interest in access.